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No.

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MAR 5 1984

ALEXANDER L. STEVENS  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,  
*Appellant,*

v.

BOARD OF PUBLIC UTILITIES OF THE STATE OF NEW  
JERSEY,  
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

**JURISDICTIONAL STATEMENT**

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March 5, 1984

## Questions Presented

1. Was the Court below correct in holding that the three investor-interest components of the criteria for determining whether electric utility rates are "just and reasonable" as specified by this Court in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy such investor-interest criteria would not exploit customers?

2. Are ratemaking determinations which fail to assess their consequences to customers and investors violative of the due process requirements of the Fifth and Fourteenth amendments by reason of being arbitrary and capricious and preclusive of meaningful judicial review?

\* In addition to the Appellant and Appellee, the parties below were Joseph H. Rodrigez, Public Advocate of New Jersey, the County of Ocean, New Jersey, the American Society of Utility Investors and Diane Fahey.

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BOARD OF PUBLIC UTILITIES OF THE STATE OF NEW  
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ON APPEAL FROM THE SUPREME COURT OF  
NEW JERSEY

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**JURISDICTIONAL STATEMENT**

Jersey Central Power & Light Company ("Jersey Central"), the Appellant, appeals from the final judgment of the Supreme Court of the State of New Jersey, denying Appellant's request for review of the decision of the New Jersey Superior Court, Appellate Division ("Appellate Division"). The Appellate Division held that the investor-interest components of the criteria for determining whether electric utility rates fixed by a rate regulatory agency are "just and reasonable" as specified by this Court in *Federal Power Commission v. Hope Natural Gas Company*, ("Hope"), 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy those criteria

would not exploit customers. On this basis, the Appellate Division held that orders of the Board of Public Utilities of the State of New Jersey ("Board"), the Appellee, fixing Jersey Central's rates for electric service which do not meet those investor-interest criteria are not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States. The Appellate Division also held that the Board had not denied Jersey Central due process by failing to assess the consequences of its orders to customers and investors. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial Federal constitutional question is presented.

### **Opinions Below**

The orders of the Supreme Court of the State of New Jersey are not reported and are annexed as Appendices A-1 and A-2. The opinion of the Appellate Division (dealing with several consolidated appeals and cross appeals from orders of the Board) is not reported and is annexed as Appendix B-1. Appellant's Notice of Appeal to the Supreme Court of New Jersey and Notice of Petition for Certification to that Court is annexed to Appendix B-2. The orders of the Board, dated May 13, 1980, July 31, 1981 and July 22, 1982 are not reported and are annexed as Appendices C-1, C-2 and C-3.

### **Jurisdiction**

On April 29, 1980, Jersey Central filed a petition for an increase in its base rates of \$173.5 million annually. By an order dated May 13, 1980 (Appendix C-1), the Board granted an emergency increase of \$60 million annually in response to that petition and by an order dated July 31, 1981 (Appendix C-2), the Board granted a final increase of \$110.7 million annually (including the \$60 million emergency increase). Jersey Central appealed the Board's July 31 1981 order to the Appellate Division.

While that appeal was pending in the Appellate Division, Jersey Central filed on August 11, 1981 a petition for a rate

increase of \$238.5 million annually (later reduced to \$215.4 million annually). By an order dated July 22, 1982 (Appendix C-3) the Board granted an increase of \$82.7 million annually. Jersey Central also appealed that the order of the Board to the Appellate Division.

Both appeals of Jersey Central, as well as the appeals and cross-appeals filed by the New Jersey Public Advocate Division of Rate Counsel ("Rate Counsel")<sup>1</sup>, were denied by the Appellate Division.

In each of the proceedings before the Board which resulted in the Board's orders annexed as Appendices C-1, C-2 and C-3, Jersey Central argued that, while the Board has complete discretion to select whatever ratemaking methodology or formula it chooses, the end result of its ratemaking orders must (in order to comply with the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States) balance the interests of consumers and investors in the manner delineated by this Court in *Hope*, (1) "to protect consumers against exploitation" and (2) "to promote the 'financial integrity' of the natural gas companies as measured, not only by revenues sufficient to recover operating expenses and capital costs . . . but also by revenues 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital'."<sup>2</sup>

1. The appeals and cross-appeals of Rate Counsel to the Appellate Division were based on Rate Counsel's contention that, in fixing rates, the Board was required to determine whether Jersey Central, as the owner of an undivided 25% interest in the Three Mile Island nuclear generating station ("TMI") was "at fault" in connection with the TMI-2 accident on March 28, 1979. This contention was initially rejected by the Board in an order dated April 23, 1981, which is not reported and is annexed as Appendix D. It was also rejected by the Board in other orders not included in the Appendix. The appeals and cross-appeals of Rate Counsel to the Appellate Division were denied by that Court as part of its decision, annexed as Appendix B. Rate Counsel sought review of that aspect of the Appellate Division's decision by the Supreme Court of New Jersey, which was denied by that Court.

Jersey Central believes that the appeals and cross-appeals of Rate Counsel do not raise a substantial Federal Constitutional question.

2. This summary of the holding in *Hope* appears in the opinion of Justice Douglas, speaking for a unanimous Court in *FPC v. Memphis*

In each of the proceedings before the Board, Jersey Central presented evidence to demonstrate that the rate increases it was seeking would not exploit consumers. It also presented evidence to demonstrate that each of the rate increases it was seeking was the minimum required to meet the investor criteria delineated in *Hope*. Notwithstanding the fact that this issue was squarely presented to the Board in testimony, briefs and oral argument, in its final rate orders, dated July 31, 1981 (Appendix C-2) and July 22, 1982 (Appendix C-3), the Board did not even address this issue. The Board did not find—and indeed, on the record before it, it could not have found—that the rate increases sought by Jersey Central would exploit customers. Similarly, the Board did not find—and indeed, on the record before it, it could not have found—that the rates which it authorized would assure Jersey Central's financial integrity so as to maintain its credit and to attract capital. Instead, the Board chose to ignore the subject completely in the ratemaking orders which are the subject of this jurisdictional statement.<sup>3</sup>

In its appeals to the Appellate Division, this was the central issue raised by Jersey Central. As previously noted, the Appellate Division held that the investor-interest components of the criteria of *Hope* "are not of constitutional dimension." The Supreme Court of New Jersey denied Jersey Central's petition, again based on that central issue, that that Court review the decision of the Appellate Division.

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*Light, Gas & Water Division*, 411 U.S. 458, 465-466 (1973). Justice Douglas was the author of the majority opinion in *Hope*.

3. The failure of the Board to address this issue in these ratemaking orders is particularly startling in light of the fact that, in its order, dated April 23, 1981 (Appendix D) which did not directly involve the establishment of rates, the Board stated in rejecting the "fault" contention of Rate Counsel:

"... there has been engrafted into the statutory framework requiring the Board to fix just and reasonable rates, N.J.S.A. 48:2-21, the 'Hope Standards' which require this Board to fix a level of rates that will provide for the financial integrity of the utility, provide it with the ability to finance needed construction, the opportunity to earn a reasonable rate of return and, most important, the ability to continue to render safe, adequate and proper service ..."

Jersey Central had repeatedly urged that the Board, in its rate orders, make unambiguous findings of fact concerning its assessment of the impact of its orders on Jersey Central's customers and investors. The Board ignored these requests. In its appeal to the Appellate Division and unsuccessful efforts to obtain review by the New Jersey Supreme Court, Jersey Central pointed out that the consequence of the Board's failure to make such findings was to make the Board's orders appear arbitrary and capricious and to preclude meaningful judicial review and thus to deny Jersey Central due process, noting the appositeness of this Court's statement in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) at 792:

"Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."

See also *D.C. Transit System v. Washington Metro Area Trans. Com'n*, 350 F.2d 753 (D.C. Cir. *en banc* 1965), cert. denied 393 U.S. 1081 (1969).

In rejecting Jersey Central's argument on this score, the Appellate division merely stated that *Hope*

"... does not say that specific findings must be made on the impact of the order on the company's financial integrity."

It is surprising, to say the least, that the Appellate Division should have referred at length to *Permian* as a basis for reaching its erroneous (in our view) conclusion that the investor-interest components of the *Hope* criteria are not of constitutional dimension, but should have ignored *Permian* completely in considering the need for explicit findings as a predicate for meaningful judicial review.

The order of the New Jersey Supreme Court was entered on December 6, 1983. Appellant's Notice of Appeal to this Court was filed with the New Jersey Supreme Court on March 5, 1984. Because the action of the Board is the equivalent of a statute of

New Jersey for jurisdictional purposes, jurisdiction to review the order of the New Jersey Supreme Court is conferred upon this Court by 28 U.S.C. § 1257(2). *Williams v. Bruffy*, 96 U.S. 176 (1878); *Lake Erie & Western R.R. Co. v. Public Utilities Commission*, 249 U.S. 422 (1919); *Bluefield Co. v. Pub. Serv. Commission*, 262 U.S. 679 (1923); *Live Oak Water Users' Ass'n v. Railroad Commission*, 269 U.S. 354 (1925); *Atchison, Topeka and Santa Fe R. Co. v. Public Utilities Commission*, 346 U.S. 346 (1953); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

### **Constitutional and Statutory Provisions Involved**

#### **Fifth Amendment, United States Constitution:**

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

#### **Fourteenth Amendment, United States Constitution:**

". . . nor shall any state deprive any person of . . . property, without due process of law . . . ."

#### **New Jersey Statutes Annotated, 48:2-21(d):**

"When any public utility shall increase any existing . . . rates . . . , the board . . . shall have the power . . . to determine whether the increase . . . is just and reasonable . . . The board shall approve the increase . . . upon being satisfied that the same is just and reasonable."

### **Statement of the Case**

Jersey Central provides electric service to the approximately two million residents of its 3,300 square mile service area comprising approximately half the land area in New Jersey. For a decade prior to the March 28, 1979 accident at Unit No. 2 of the Three Mile Island nuclear generating station ("TMI-2") in which Jersey Central owns a 25% undivided interest, its rates were the lowest in the State and were also appreciably below those in neighboring areas in New York. This was in significant

part attributable to Jersey Central's ownership of the Oyster Creek nuclear generating station (placed in service in 1969) and of an undivided 25% interest in the TMI-1 nuclear generating unit (placed in service in 1974).

Jersey Central is a subsidiary of General Public Utilities Corporation ("GPU"), a public utility holding company registered under the Public Utility Holding Company Act of 1935. GPU's other public utility subsidiaries, Metropolitan Edison Company and Pennsylvania Electric Company, provide electric service to the approximately 2.4 million residents of their 17,600 square mile service areas (comprising about half the land area in Pennsylvania) and respectively own 50% and 25% undivided interests in TMI.

TMI-2 was placed in commercial service in December, 1978. The TMI-2 accident occurred three months later on March 28, 1979, and made TMI-2 inoperable. Although the TMI-2 accident did not result in damage to TMI-1, the Nuclear Regulatory Commission ("NRC") has required that TMI-1 not be operated until authorized by the NRC.

New Jersey procedures for fixing rates for electric utilities provide for the establishment of base rates in conventional rate proceedings, and for the establishment of levelized energy adjustment clause ("LEAC") charges (intended to recover only energy costs) in abbreviated proceedings, including hearings, subject to later revision in conventional rate proceedings.

At the time of the TMI-2 accident, Jersey Central's LEAC charges in effect had been predicated on the anticipated availability of generation from TMI-1 and TMI-2. In order to continue service to its customers, Jersey Central had to purchase replacement power from neighboring utilities at higher cost. In May 1979, Jersey Central applied to the Board for an increase in its LEAC charges, which was authorized by the Board on June 18, 1979. In its order granting the increased LEAC charges, the Board also reduced Jersey Central's base rates by an amount representing Jersey Central's share of the operating and capital costs of TMI-2. Given its need for a final LEAC order as a basis

for bank borrowings in order to continue the purchases of replacement power, Jersey Central was not in a position to, and did not, appeal the Board's June 18, 1979 order.

Fuel and energy costs continued to rise and Jersey Central had to seek further increases in its LEAC charges. Jersey Central did not seek at that time an increase in its base rates. An increase in the LEAC charges was granted by the Board by an order dated April 1, 1980. In another Order, also dated April 1, 1980, the Board eliminated from Jersey Central's base rates the capital and operating costs of TMI-1, as well as those of TMI-2. Jersey Central argued to the Board that, while the Board had broad discretion as to ratemaking methodology and formulae, *Hope* and its progeny required that the Board apply the criteria therein set forth to determine whether the rates prescribed by the Board appropriately balanced the interests of consumers and investors. In that context, Jersey Central pointed out that its total charges to its customers were below those of the great majority of the customers of other New Jersey electric utilities and of utilities in neighboring areas in other states, and that the base rates fixed by the Board were below those necessary to meet the *Hope* criteria for investor interests. The Board refused to address this issue and Jersey Central appealed to the Appellate Division.

The New Jersey Supreme Court certified this appeal to itself before decision by the Appellate Division. In the meantime, Jersey Central had filed a petition for a base rate increase. On April 8, 1981, the New Jersey Supreme Court affirmed the Board's April 1, 1980, order, *In re Jersey Central Power & Light Company Petition*, 85 N.J. 520, 428 Atl. 2d 498 (1981). In that opinion, the New Jersey Supreme Court indicated that it did so, in part at least, based on the unusual procedural posture in which Jersey Central "... had not applied for a rate increase so that available avenues of relief were limited." 85 N.J. at 531; 428 Atl. 2d at 503-4.

That court also recognized that Jersey Central then had pending before the BPU a rate increase application, and stated:

"We regard the numerous issues raised by the utility in this appeal to be more properly presented in the pending rate increase proceeding.<sup>4</sup> In addition to dealing with the utility's troubled financial condition and fixing just and reasonable rates, the Board in that proceeding necessarily will have to give full attention to the continued exclusion of TMI-1 from the rate base."<sup>5</sup> 85 N.J. at 532; 428 Atl. 2d at 504.

Notwithstanding this seeming directive from the New Jersey Supreme Court on April 8, 1981 and the Board's own recognition of the requirements of *Hope* in its April 23, 1981 order which did not fix rates, less than four months later the Board's July 31, 1981 ratemaking order wholly ignored *Hope*. The Board's July 22, 1982 ratemaking order did the same thing.

In the proceedings before the Board and in the appeals to the Appellate Division and petition to the New Jersey Supreme Court for review of the Appellate Division's decision, Jersey Central presented unchallenged evidence that, even if its requested rate increases were granted in full, Jersey Central's rates would be in line with those of customers of other utilities in New Jersey and neighboring areas. (See, e.g. Appendix, pages A-49 through A-52) Neither the orders of the Board nor the decision of the Appellate Division suggested that the rates sought by Jersey Central would "exploit" its customers. It was also undisputed that Jersey Central has continued to render safe, adequate and reliable service.

4. The "pending rate increases proceeding" referred to by the New Jersey Supreme Court is the proceeding that gave rise to the July 31, 1981 order of the Board (Appendix C-2) that was the subject of the first of the consolidated appeals and cross-appeals to the Appellate Division now sought to be reviewed by this Court.

5. Although this passage suggests otherwise, Jersey Central had not contested before the Board or the New Jersey Supreme Court the power of the Board to exclude TMI-1 from the rate base. Rather it had urged there, as it does here, that, regardless of the methodology chosen by the Board, the end result of the Board's orders must satisfy both the customer and investor interest criteria delineated in *Hope*.

In those proceedings before the Board and before the New Jersey courts, Jersey Central also established, without challenge, that the revenues allowed to it by the Board's orders were not sufficient to promote its financial integrity and to enable it to attract capital. For four years, Jersey Central was unable to pay a single dollar of dividends on the common stock investment in Jersey Central of approximately \$700 million. Jersey Central has been unable to sell any long-term securities since 1979. It does not have the financial means to undertake any major generating facility construction programs or even to implement fully its load management and conservation program.

As previously noted, the Board's orders do not even address the investor component of the *Hope* criteria. The Appellate Division does address that component, but it reaches the startling—and unfounded, we believe—conclusion that those criteria are not of Constitutional dimension. In so doing, the Appellate Division mistakenly reads *Permian* as overruling *Hope* and, yet, ignores *Permian's* exposition (at 792) of the need for clear findings by a regulatory agency in order that there can be meaningful judicial review.<sup>6</sup>

### **The Federal Question is Substantial**

Almost forty years ago, in *Hope*, this Court relieved rate regulatory and reviewing courts of the shackles of conformity to particular ratemaking methodology and formulae.<sup>7</sup> In so doing, however, this Court also provided the twin consumer-interest and investor-interest criteria by which to ascertain whether the end result of a ratemaking order meets the "just and reasonable" rate standard. More than fifteen years ago, in *Permian* this Court

6. The Appellate Division's opinion attributes to Jersey Central positions that it did not take and arguments that it did not make. Jersey Central's position before the Board and Appellate Division, and its arguments made to them, are consistent with those made in this Jurisdictional Statement.

7. This aspect of the decision in *Hope* had been foreshadowed, two years earlier, by this Court's decision in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-6 (1942), which recognized—as did this Court again in *Permian*—that the "just and reasonable" standard of the Federal Power Act "coincides with that of the Constitution" and also that "the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."

held that the "just and reasonable" standard as construed in *Hope* "coincides" with the applicable constitutional standards. More than a decade ago, in *FPC v. Memphis Light, Gas and Water Division*, 411 U.S. 458 (1973) this Court not only unanimously reaffirmed the continuing vitality of the *Hope* criteria, but it reversed the Court of Appeals for the District of Columbia Circuit because that court had ignored the investor interest component of the *Hope* criteria.<sup>8</sup>

The decision of the Appellate Division challenges directly those holdings of this Court. It eliminates any concrete standards by which the results of ratemaking may be evaluated. Under that decision, so long as a ratemaking agency merely asserts that it is "balancing investor and consumer interests", there is no function for a reviewing court to perform and no judicial remedy available to assure compliance with the holdings of this Court.

### **The Court's Historic Role and the National Interest Warrant Review by This Court**

During the 44 year period between *Smyth v. Ames*, 169 U.S. 466 (1898) and *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), the Court heard an unduly large number of utility rate cases, as it sought to clarify the so-called "rule of *Smyth v. Ames*". Justices Brandeis and Holmes were highly critical of these efforts. See, e.g. *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289 (1923) (cited approvingly in *Hope*, *supra*, at 603). Yet, they also recognized that investors in public utility securities are constitutionally entitled to a return of, and on, the capital they supplied to the utility so long as the resulting rates are not prohibitive, exorbitant or unduly burdensome to the public. *Southwestern Bell*, *supra*, at 290.

Jersey Central recognizes fully the limits on the Court's review of State statutes reflected in *Ferguson v. Skrupa*, 372 U.S. 726, 730-732 (1963). But in *Ferguson*, the Court also recognized

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8. Although the decision in *Memphis* and its significance were presented to the Appellate Division, its opinion does not mention *Memphis*.

that State statutes can run afoul of a specific Federal constitutional requirement and, thereby, be invalid. The Fifth and Fourteenth Amendments are just such a specific Federal constitutional limitation on State action.<sup>9</sup>

Jersey Central respectfully submits that the Appellate Division's opinion in this case demonstrates that State ratemaking actions have, in recent years, become unhealthily insulated from review by the Court. It is one thing for the Court, quoting Justice Douglas (who was the author of the Court's opinions in both *Hope* and *Memphis*) to refuse to sit as a superlegislature to weigh the wisdom of State legislation. *Ferguson, supra*, at 731. It is another for the Court to refuse to consider, year after year, the application of Federal Constitutional criteria to ratemaking actions by State agencies and courts.

In *Hope, supra* and *Memphis, supra* the Court set forth the criteria to be employed in determining whether rates meet the just and reasonable standards of the Natural Gas Act and, in *Natural Gas Pipeline, supra* and *Permian, supra* held "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards". We submit that it is abundantly clear that the Appellate Division has misapplied the teachings of this Court and, in the process, made ephemeral the Constitutional rights of investors carefully preserved by this Court.

The New Jersey courts are charged not only with the construction of New Jersey law. They are also charged with the application of the Federal Constitution (and the decisions of this Court relating to the Constitution) to such laws. In this case, the Appellate Division erred in its application and the New Jersey

9. As previously noted, in *Permian, supra* at 769-770, the Court recognized once again that the Fifth and Fourteenth Amendments place some limits on the governmental exercise of ratemaking authority, citing *Stone v. Farmers Loan & Trust Co.*, 116 U.S. 307, 331, (1886) and *Covington & Lexington Turnpike Co. v. Sandford*, 164 U.S. 578, 593 (1896) (both of which involved State ratemaking actions) and that a balancing of consumer and investor-interests in accordance with the *Hope* criteria is necessary to pass Constitutional muster.

Supreme Court refused to consider whether it should correct that error.

Review by this Court is warranted to assure that the New Jersey courts and other State courts fully discharge their federal responsibilities.

### Conclusion

The services rendered by electric, gas, telephone, water and other utilities are essential to the health and well-being of the Nation. In terms of requirements for capital, they far overshadow any other industry. Regulation of their rates and service is singularly pervasive and a demonstration of the awesome power of government. Because that power is primarily wielded at the State, rather than Federal level there is little constraint on its exercise other than that arising from the Fifth and Fourteenth Amendments to the United States Constitution as interpreted by this Court.

By and large, the regulators of public utility rates are well-intentioned, hardworking, and intelligent custodians of the public weal. This is clearly true of the members of the New Jersey Board. But their task is most difficult and the public pressures upon them are intense. Their ability to discharge their responsibilities properly will be enhanced, not diminished, by a reminder by this Court to such regulators and state appellate courts at this time of its observation in *Permian, supra* at 769 that:

"It is, however, plain that the 'power to regulate is not the power to destroy', *Stone v. Farmers' Loan & Trust Company*, 116 U.S. 307,331; *Covington & Lexington Turnpike Co. v. Sandford, supra*; and that maximum rates must be calculated for a regulated class in conformity with pertinent constitutional limitations.

For the foregoing reasons, the Appellant respectfully submits that the Federal questions presented by this appeal are substantial and of public importance and were properly presented below and that this Court should note probable jurisdiction of this appeal. —

Respectfully submitted,

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March 5, 1984

**Certificate of Service**

I hereby certify that on the 5th day of March, 1984, copies of the foregoing Jurisdictional Statement and of the Separate Appendix thereto were mailed, by first class mail, postage prepaid, to the Board of Public Utilities, State of New Jersey, 1100 Raymond Boulevard, Newark, New Jersey 07102, Attention: Ms. Blossom Peretz, Secretary. I further certify that all parties required to be served have been served.

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**SEPARATE APPENDIX TO  
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**Appendix A-1**

**SUPREME COURT OF NEW JERSEY  
C-251 SEPTEMBER TERM 1983**

21,691

**ON PETITION FOR CERTIFICATION**

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES  
AND CHARGES IN THE TARIFFS FOR SUCH SERVICE (BPU  
DOCKET No. 804-285)**

**(Jersey Central Power and Light—Petitioner)**

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-218/220/227/219/224-82T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding, Justice at Trenton, this 6th day of December, 1983.

**STEPHEN TOWNSEND**  
Clerk

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**Appendix A-2**

**SUPREME COURT OF NEW JERSEY  
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**ON PETITION FOR CERTIFICATION**

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES  
AND CHARGES IN THE TARIFFS FOR SUCH SERVICE (BPU  
DOCKET NO. 804-285)**

**(Public Advocate—Cross-Petitioner)**

**To the Appellate Division, Superior Court:**

**A petition for certification of the judgment in A-218/220/227/224-82T1 having been submitted to this Court, and the Court having considered the same;**

**It is ORDERED that the petition for certification is denied.**

**WITNESS, the Honorable Robert L. Clifford, Presiding,  
Justice at Trenton, this 6th day of December, 1983.**

**STEPHEN TOWNSEND  
Clerk**

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**Appendix B-1**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

A-162-81T2

A-218-82T1

A-220-82T1

A-227-82T1

A-219-82T1

A-224-82T1

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN  
THE TARIFFS FOR SUCH SERVICE (BPU DOCKET No. 804-285)**

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**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF  
TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELEC-  
TRIC SERVICE AND A REVISION IN DEPRECIATION RATES (BPU  
DOCKET Nos. 818-726, 818-736)**

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**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY LEVELIZED ENERGY ADJUSTMENT (BPU DOCKET  
Nos. 821-75, 818-726)**

Argued: April 19, 1983—Decided: July 28, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Final Decisions of New Jersey Board of Public Utilities.

William F. Hyland argued the cause for Jersey Central Power & Light Company (Riker, Danzig, Scherer & Hyland, attorneys; Kirstein, Friedman & Cherin, Berlack, Israels & Liberman, of counsel; James B. Liberman, Jack B. Kirstein, Edward K. DeHope, on the briefs).

Linda S. Lodenkamper, Assistant Deputy Public Advocate, and Menasha J. Tausner, Deputy Public Advocate, argued the cause for the Public Advocate (Joseph H. Rodriguez, Public Advocate of New Jersey, attorney; Roger L. Camacho, Director, Division of Rate Counsel, of counsel).

Carla Vivian Bello, Deputy Attorney General, argued the cause for Board of Public Utilities (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

John C. Sahradnik argued the cause for County of Ocean (Berry, Kagan, Privitera & Sahradnik, attorneys (William E. Conklin, Jr., on the brief).

John M. Quain, admitted *pro hac vice*, argued the cause for American Society of Utility Investors (Milton Lowenstein, attorney).

Edward Lloyd argued the cause for Diane Fahey.

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

These consolidated appeals involve four orders of the Board of Public Utilities which impact upon rates charged by Jersey Central Power and Light Company (JCP&L). Two of the orders involved, that of April 23, 1981 which rejected the Public Advocate's demand for a Board inquiry into the causes of the Three Mile Island nuclear accident, and July 31, 1981 which permitted an increase in JCP&L's annual revenues, are the subject of appeals taken in Docket A-162-81.

During the pendency of Docket A-162-81, JCP&L filed a new rate case with the Board. That case culminated in an order, dated July 22, 1982, in which the rates set in the previous July 31, 1981 order were augmented with new rates based upon the Board's latest analysis of JCP&L's revenue requirements. Similarly, during the pendency of proceedings in Docket A-162-81, JCP&L petitioned the Board for an increase in its Levelized Energy Adjustment Clause revenues (LEAC). That petition resulted in a Board order dated September 2, 1982 permitting an increase in JCP&L's LEAC.

On March 28, 1979, there occurred what has been termed "the worst accident in the history of commercial nuclear power generation" in the United States. Report of the President's Commission on the Accident at Three Mile Island (October 1979). The incident at Metropolitan Edison's (Met Ed's) Three Mile Island nuclear power plant, Unit 2 (TMI-2), located near Harrisburg, Pennsylvania, has had nationwide implications not only in terms of the future of nuclear generation but also with respect to the financial viability of some of the largest public utilities in this country.

While the immediate concerns of public officials understandably focused on the potential health hazards associated with the nuclear accident, those involved in the areas of public utility regulation soon were presented with unprecedented economic issues. The most pressing problem facing those utilities previously dependent upon TMI for power has been the need to locate

and purchase alternate energy. Not only has the damaged TMI-2 Unit remained inoperable, but its companion Unit, TMI-1, shutdown for routine refueling at the time of the accident, has continued in that state by order of the Nuclear Regulatory Commission (NRC).

Appellant JCP&L, a public utility of this State and owner of a 25% interest in the Three Mile Island facility, was a TMI-dependent utility which has directly experienced the economic impact since the event of March 28, 1979. Because of the accident, JCP&L has been before the New Jersey Board of Public Utilities on an almost daily basis seeking various forms of relief.

The appeal in A-162-81 arises from an April 29, 1980 filing by JCP&L requesting an increase of \$173.5 million in annual revenues. That filing included a request that \$60 million of the increased revenues sought be granted on an emergent interim basis. The interim request was heard directly by the Board, while the remainder of JCP&L's rate request was forwarded to the Office of Administrative Law for hearings pursuant to N.J.S.A. 52: 14F-1 et seq.

On May 13, 1980, after hearing testimony related to JCP&L's interim rate request, the Board granted the Company an emergent increase in its base rates amounting to \$60 million. In so doing, the Board specifically addressed the Company's dire financial circumstances, noting: (1) that JCP&L was about to exhaust its short-term debt limit under a special revolving credit agreement with bankers; (2) that JCP&L did not possess sufficient coverages to sell long-term debt; (3) that JCP&L's parent company, General Public Utilities, was unable to sell common equity at a reasonable price; (4) that JCP&L lacked sufficient coverages to sell preferred stock, and (5) that JCP&L was unable to finance construction required to ensure safe, adequate and proper service to the public.

Following the granting of interim relief, and while the Company's base rate case was still pending before the Office of Administrative Law, the Public Advocate filed a motion with the Board seeking a moratorium on all future JCP&L rate relief

pending a Board determination as to primary responsibility for the accident at Three Mile Island. A similar motion was filed by Ocean County. On April 23, 1981, the Board issued a lengthy order detailing its position as to what had come to be termed the TMI "fault" issue. In that order, the Board concluded that the granting of the motions for a fault investigation would be "counter-productive to the public interest," "procedurally unmanageable" and detrimental to "those positive efforts under way to share the cost burdens of the TMI accident." Responding to the movants' requests for a moratorium on all future JCP&L rate increases the Board stated:

[T]he benefit to the customer of receiving reliable electric service requires a utility healthy enough to provide that service. Embarking on a fault investigation of a nuclear accident, a most complex endeavor at best, and freezing currently pending rate cases until such a proposed investigation is completed, is not in the public interest. Such a course could be of no real benefit to the ratepayer, since reasonable replacement power costs must be paid for if ongoing service is to continue.

The Board also noted that a "fault" investigation would add little to the protection already afforded the public by previous Board orders dealing with the rate-making status of TMI-1 and TMI-2. For example, JCP&L's base rates had already been reduced by approximately \$46.9 million annually as a result of the Board's removal of TMI-1 and TMI-2 from the Company's rate base. By that removal, the Board insured that JCP&L's ratepayers would not be bearing the double burden of providing the Company with capital and operating expenses related to the nongenerating TMI units while at the same time bearing the cost of replacing energy formerly produced by such units.

The Board found that a fault investigation was not necessary to protect properly the public from undue TMI-related charges, and further that such an investigation might jeopardize the very public interest the movants and the Board sought to serve. Aware of

pending private litigation involving the question of TMI negligence, the Board stated:

[I]nitiating a fault investigation would be counterproductive to two pending lawsuits where the negligence question will be tried in a proper forum. General Public Utilities commenced action on March 25, 1980 against Babcock and Wilcox in U.S. District Court, Southern District of New York alleging various grounds of negligence, such as defects in design and improper control procedures. Consistent with appropriate regulatory policy, we believe that benefits flowing to the utility system from this lawsuit will be properly allocated to benefit the New Jersey ratepayer. Likewise, the utility system filed suit on December 8, 1980 against the Nuclear Regulatory Commission under the Federal Tort Claims Act alleging negligent acts and omissions by the Staff of the NRC. Consistent with regulatory policy, recoveries from this lawsuit will be allocated to the benefit of the New Jersey ratepayer. *The inappropriateness of using this Board as a duplicate forum to try the negligence of the parties is evident. . . . It is evident that the question of fault is not a simplistic one and will be properly before the Federal Courts.* [emphasis added]

Also bearing upon the Board's decision not to embark upon a unilateral fault investigation was the issue of NRC jurisdiction over the design construction and operation of nuclear facilities:

[T]he design construction and operation, as well as the development, use and control of nuclear facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. The Pennsylvania Commission stated flatly in its Order dated January 10, 1980, . . . 'The design construction and operation of the nuclear reactor at TMI-II are under the exclusive jurisdiction of the Nuclear Regulatory Commission'. We prefer to conclude that the Federal Atomic Energy Act, 42 U.S.C.A. 2011 *et seq.*, vests exclusive jurisdiction in the NRC only over activities reasonably related to the protection against radiation hazards; 42 U.S.C.A. 2021(k). But certainly the Atomic Energy Act vests at least primary jurisdiction in the NRC by a pervasive regulatory scheme controlling the development of nuclear energy through the promulgation of

detailed regulations. Certainly this Board should defer to the expertise of the Federal Body according to the concept of primary jurisdiction in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion. [emphasis added; footnotes omitted]

Finally, the Board noted the futility of conducting a TMI fault investigation if the objective of such an investigation was to exact from JCP&L a penalty should fault on its part be found:

How can this Board meet its primary statutory obligation to see that safe, adequate and proper service is provided by a viable entity if it embarks upon the road proposed by the movants? The proposed procedure could either result in a morass of conflicting claims or some attribution of management imprudence to JCP&L which, if effectuated in penalties, would jeopardize vital electric service.

In summarizing its fault position, the Board concluded:

Suffice it to say that we have an out-of-state accident, an overlay of primary federal authority, split ownership of the TMI facilities and management control of the facilities by a Pennsylvania utility. We also have the results of two major fault inquiries [the Kemeny Commission Report of October 1979 and the Rogovin Report of January 1980], which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results. . . . We do not see much point in attempting to duplicate these efforts. Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-I returns to service. After what we envision to be a protracted and complex proceeding we would still have to balance the customers['] interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

Leave to appeal from the Board's April 23, 1981 order declining to investigate TMI fault was not sought by either the Advocate or

Ocean County. Both the Advocate and Ocean County, however, have made fault the subject of their cross-appeals in the proceeding arising out of the Board's final rate order of July 31, 1981.

Having denied a moratorium on rate increases pending a fault investigation, the Board, on July 31, 1981, after receipt of an Initial Decision from the Office of Administrative Law, issued its final rate order dealing with JCP&L's request for \$173.5 million in additional annual revenues. In that order, the Board addressed the usual issues involved in any rate case: rate base, operating income, rate of return and rate design. At issue in this appeal are (1) the Board's findings with respect to the Company's rate base/rate of return, specifically whether the Board properly continued the exclusion of TMI-1 from JCP&L's rate base; and whether the permitted rate of return should have reflected such reduction in rate base, and (2) the Board's findings as to operating income, specifically whether the Board properly treated JCP&L's investment in the abandoned Forked River project.

On the issue of rate base treatment of TMI-1 the record below disclosed continuing uncertainty on the part of the JCP&L as to the eventual return to service of TMI-1. Based upon testimony to that effect, the Board rejected the recommendation of the Administrative Law judge that TMI-1 be returned to JCP&L's rate base:

[C]ircumstances have not changed sufficiently to warrant TMI-1 being placed back into rate base at this time. There have been many delays in bringing this unit back on line and we continue to support the treatment of TMI-1 as set forth in the Board's Order of April 1, 1980 in Docket No. 795-427. As it is our position that TMI-1 should not be placed back into rate base until restart, we reject that portion of the [ALJ's] Initial Decision which calls for its inclusion. At the time of restart, the Board will consider in expedited proceedings the appropriate rate base and revenue adjustment related to the TMI-1 return to service.

As to the Forked River plant, JCP&L in its initial request to the Board sought the inclusion of this proposed nuclear station in its rate base as "construction work in progress" (CWIP).

JCP&L admitted, however, that uncertainty clouded the future of the Forked River plant and that it was considering whether to (1) proceed with construction of a nuclear unit at Forked River, (2) convert the station to another fuel source, or (3) abandon the project entirely. In November 1980, during the pendency of the proceeding below, the Company announced that the Forked River project was being abandoned.

After announcing the project's abandonment, JCP&L amended its rate request so as to provide for a write-off of its abandonment loss. The Company proposed two rate-making approaches: (1) amortization of its Forked River investment over a 15-20 year period *with* a return on the unamortized portion or, in the alternative, (2) amortization of its Forked River investment over a 10 year period *without* a return on the unamortized balance. The Advocate proposed a 15-20 year amortization of the Forked River loss *without* rate base treatment of the unamortized balance. Similarly, the Board's Staff recommended a 15 year write-off *without* a return on the unamortized balance.

Also at issue with respect to the rate-making treatment to be accorded Forked River was whether the Company should be permitted to include in its calculation of its abandonment loss an "allowance for funds used during construction" (AFUDC), *i.e.*, the carrying charges on the Company's investment accrued after April 4, 1979—the date the Company "temporarily suspended construction. Both the Staff and the Public Advocate opposed the inclusion of AFUDC accrued subsequent to the suspension of actual construction on the project in the calculation of JCP&L's abandonment loss.

In its final order, the Board adopted the Administrative Law judge's recommendation that the Forked River investment be amortized over a 15 year period without a return on the unamortized balance. The Board rejected the Company's inclusion of AFUDC accrued after April 4, 1979 in the calculation of the investment to be amortized.

As to the issue of rate of return, JCP&L's rate of return witness, a security analyst and corporate financial advisor, testified in support of an overall rate of return of 12.5% to 12.75%, based upon a cost of equity ranging from 18.75% to 20%. His recommendation reflected his evaluation of the investors' perception of risk associated with regulatory actions taken in the wake of the Three Mile Island accident, particularly the Board's removal of TMI-1 from rate base. In opposition to that witness, the Public Advocate presented an economic consultant, who calculated a cost of equity in the range of 13.5% to 14.35%, yielding an overall rate of return of 10.28% to 10.46%. In contrast to the positions taken by both the Company and the Public Advocate, the Staff recommended an overall rate of return of 11.03% based upon a cost of equity of 16%.

After reviewing the various positions presented on rate of return, the Administrative Law judge calculated an overall rate of return of 11.21%, based upon a 16.5% cost of equity. That return, in his opinion, approximated the recommendations set forth by the Board's Staff.

In its final order the Board modified the Administrative Law judge's recommended rate of return on equity downward by .5%, thus allowing the Company a 16% return on equity with an overall rate of return of 10.68%. The Board believed that that rate, "the highest ever granted a New Jersey utility," adequately reflected risks facing the Company. The Board also noted that in addition to granting this unprecedented rate of return, it had taken numerous steps in the last few years to assist the Company in dealing with the financial impact associated with Three Mile Island. These steps included, among others: (1) approval of a Revolving Credit Agreement to provide the Company with short-term funds; (2) the allowance of accelerated amortization of a deferred energy balance; (3) Board intervention in federal administrative proceedings involving the pricing of energy sold to JCP&L; (4) Board support for early NRC approval of a TMI-1 restart; (5) Board endorsement of a federal contribution to TMI-2 clean up costs. In light of such continuing supportive

regulatory efforts, an overall rate of return of 10.68% was deemed sufficient. The Board pledged itself "to monitor this level" carefully in subsequent rate filings.

The various adjustments made by the Board in its final order resulted in an increase in appellant's annual revenues of \$110,713,000 as contrasted with the \$173.5 million requested. JCP&L filed a notice of appeal from the Board's order. Notices of cross appeal from the order of the Board on the issue of TMI fault were filed by the Public Advocate and the County of Ocean. A notice of cross appeal was also filed, *pro se*, by Diane Fahey, one of the customers serviced by JCP&L.

As we have noted, the Board, on June 18, 1979, permitted JCP&L to recover replacement energy costs through its Levelized Energy Adjustment Clause (LEAC).<sup>1</sup>

At the same time, the Board reduced JCP&L's base revenues by 29 million to reflect the exclusion from the rate base<sup>2</sup> of the investment and operating costs associated with the idle TMI-2 unit. This was ordered by the Board so as to avoid inflicting the ratepayer with the double burden of carrying replacement energy costs as well as providing investors with a return upon the non-generating TMI-2 plant. Similarly, when it became apparent that the companion TMI-1 unit, although undamaged in the accident, would remain out of service indefinitely by order of the NRC, the Board by order dated January 21, 1980, removed another \$17.9 million from JCP&L's rate base, representing the Company's TMI-1 investment. The Board's action in so balancing the impact of TMI upon investors and ratepayers was reviewed and affirmed by the Supreme Court in *In Re Jersey Central Power & Light Co. Petition*, 85 N.J. 520 (1981).

1. LEAC is a regulatory process used to adjust consumer rates as a result of fluctuations in fuel costs. A constant LEAC charge is based upon the utility's estimated prospective average 12 month energy costs. This charge is subject to earlier adjustment in the event over-recoveries or under-recoveries are experienced.

2. Rate base refers to investor-supplied plant, facilities and other assets upon which a utility is permitted to earn a return.

Since the Supreme Court's decision in *In Re Jersey Central Power & Light Co. Petition*, the Board has issued four more TMI-related rate orders, as we have noted.

The orders dated July 22, 1982 dealing with a Board ordered increase in JCP&L's base rates, and that dated September 2, 1982 permitting an increase in JCP&L's LEAC revenues, are the subject of the appeals filed by JCP&L, the Public Advocate and others in Docket Nos. A-218,82T1 and A-219-82T1.

On August 11, 1981, JCP&L filed a petition with the Board seeking an increase in annual base rate revenues in the amount of \$238.5 million. The matter was referred by the Board to the Office of Administrative Law for hearing as a contested case. At a prehearing conference held before the Administrative Law judge, the Public Advocate and ratepayer intervenor Diane Fahey sought to have the scope of the rate proceeding expanded to include an inquiry into the cause of the accident at the TMI nuclear facility. In response to that attempt to broaden the scope of the proceeding before the OAL, the Board set forth its position as to the relevancy of the TMI fault issue in three letters sent to the Administrative Law judge and all parties in the proceeding. In a November 6, 1981 letter, counsel for the Board stated:

[I]t is the position of the Commissioners of the Board of Public Utilities . . . that (1) the Board's "Order on Motion," dated April 23, 1981, in JCP&L's previous rate case sets forth at length the Board's decision not to reach an independent conclusion as to TMI-fault while that issue is being actively litigated before various federal agencies and judicial bodies, (2) that the Board's April 23, 1981 Order is, therefore, dispositive of the TMI-fault question in the (present) docket; and (3) the Board's certification of the fault issue in the previous docket and its expression of its position re the fault question in the April 23, 1981 Order, constitute a continuing reservation by the Board of this issue, i.e., the Board has retained jurisdiction over TMI-fault issues.

Again, in a letter to the Administrative Law judge and all parties dated November 13, 1981, the Board responded to a

request by the Administrative Law judge for further argument on the fault issue in connection with the possible recovery of TMI clean up costs:

The Board relies upon its letter to you of November 6, 1981. The position of the Board is clear and will not be restated in detail here. Suffice it to say that, pursuant to N.J.S.A. 52:14F-8(b), the Board has specifically reserved all policy questions relating to TMI fault issues unto itself and has set forth its policy determinations in its April 23rd Order in Docket No. 804-285. The issue of clean-up costs is inherent in this continuing reservation. However, in order to further clarify the situation, kindly be advised that the Board specifically reserves unto itself and certifies to itself, for notice and hearing as appropriate, that part of the [present] petition which requests increases in rates due to TMI clean-up costs, and all associated proposed arguments, including the Public Advocate's "fault" position and all associated proposed proofs and revenue impacts.

The parties are, therefore, directed to file all further arguments, pleadings or proofs directly to the Board on this issue, for further evaluation by the Board. The Board will consider and evaluate whether a fault inquiry is in the public interest with respect to TMI clean-up costs. N.J.S.A. 52:14F-8(b) vests the agency head with the clear power to conduct its own hearings with respect to this issue. . . .

On December 1, 1981 the Board again wrote to the Administrative Law judge with respect to its reservation of TMI fault issues:

[P]lease be advised that the Board has certified all arguments and testimony related to the Board's policy on the fault issue. Inasmuch as the Public Advocate has indicated that it intends to make fault-related arguments in connection with the company's proposal to include TMI-2 in rate base, the Board's reservation of the fault issue extends to the TMI-2 rate base issue as well.

In a letter dated November 6, 1981, the Public Advocate urged the Administrative Law judge to ignore the Board's reservation of the TMI fault issues.

Characterizing the Board's declaration of a continuing reservation of the TMI fault issue as "a motion to return the issue of 'fault'" to the Board, the Administrative Law judge, in what he captioned a Procedural Order Decision on Motion, stated:

As to the Board's assertion that it can take back issues once transmitted, I feel that to state this proposition is the functional equivalent of deciding that the Board can respond to an administrative law judge's procedural order by making the subject matter of that order disappear. This is inconsistent with the view expressed in the "Uniform Administrative Procedure Rules of Practice" [footnote omitted] promulgated by the Chief Administrative Law Judge under a clear grant of statutory authority. . . . Therefore, the Board is powerless to recall a single issue from a transmitted contested case.<sup>3</sup>

He then proceeded to exercise what he believed to be his discretionary authority to determine whether or not the Board could hear the TMI fault issue directly:

I ORDER, under the exercise of my discretion, that this issue be sent back to the Board, and I characterize the Order as procedural, under *N.J.A.C. 1:1-9.7(e)*, and, hence, appealable only to the Superior Court Appellate Division.

The Board prepared to conduct its own hearings with respect to (1) JCP&L's request for restoration of TMI-1 and 2 to rate base with associated operating and maintenance expenses, and (2) JCP&L's request for recovery of decontamination costs associated with the damaged TMI-2 unit. In a prehearing order, dated April 30, 1982, the Public Advocate's claim that a determination as to TMI culpability was necessary prior to the passing on to ratepayers of any accident-related costs was addressed by the

3. The rule of practice referred to by the Administration Law judge was subsequently found to be invalid by the Supreme Court of New Jersey in *In re Uniform Adm'v Procedure Rules*, 90 N.J. 85 (1982).

Board. Referring to an earlier order issued by it with respect to recovery of TMI replacement energy costs, the Board stated:

We have fully dealt with the "fault" issue at length in a previous decision. *In re Jersey Central Power and Light Company*, Decision on Motion, Docket Nos. 95-427, 804-285 and 811-25 (April 23, 1981). We reiterate that decision in which we concluded that the NRC has primary jurisdiction to determine compliance with standards with regard to the design, construction, operation and use of nuclear facilities.

In the April 23, 1981 "fault" decision relied upon by the Board, problems associated with initiating a TMI fault inquiry were analyzed in detail.<sup>4</sup> With respect to overriding NRC jurisdiction, the Board has stated:

[T]he design construction and operation, as well as the development, use and control of nuclear facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. . . . Certainly this Board should defer to the expertise of the Federal Body according to the concept of primary jurisdiction in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion.

Referring to two investigative reports claimed by the Advocate to simplify the quantification of TMI-fault, the Board stated:

We . . . have the results of two major fault inquiries [the Kemeny Commission Report of October, 1979 and the Rogovin Report of January, 1980], which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results. . . .

The Kemeny Commission Report of October, 1979 utilizing the resources of a staff of 200 experts and the Rogovin Report of January, 1980, utilizing a staff of 100 nuclear engineers and scientists, attributed the accident to a complex of intertwining factors including inadequately designed equipment, inadequate training of personnel,

4. The April 23, 1981 'fault' order referred to by the Board is the subject of the appeal taken by the Public Advocate in Docket A-162-81T2.

inadequate emergency room procedures, inadequate control room design and a system of divided responsibilities between the manufacturer, the Pennsylvania operator, the Nuclear Regulatory Commission, and the New York holding company. We do not see much point in attempting to duplicate these efforts.

The Board in its April 1981 order had acknowledged that even if it were to succeed in precisely establishing the degree of culpability, if any, attributable to JCP&L the imposition of any resultant penalty or disallowance would necessarily have to be balanced against the public's interest in continued utility service:

Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-1 returns to service.

Even after a fault inquiry, therefore, the Board would:

[S]till have to balance the customers['] interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

The Board in its April 23, 1981 "fault" decision also expressed its concern for the impact the initiation of a fault inquiry might have upon an already wary banking community upon which JCP&L was exclusively dependent for credit, and also upon possible recovery by ratepayers in related civil litigation involving alleged negligence by Babcox and Wilcox, manufacturers of the TMI reactor.

In addition to the relevancy of TMI-fault, numerous other ratemaking issues were explored at the hearings below. Of those issues, the following are relevant to the present consolidated appeal: (1) the regulatory treatment to be accorded TMI-1 and TMI-2 in the computation of JCP&L's rate base; (2) ratepayer funding of TMI-2 decontamination costs; (3) the appropriate level of rate of return and (4) the appropriate level of the Company's cash working capital allowance.

During the course of the hearings before the Board, JCP&L argued for the return of TMI-1 to its rate base. TMI-1, although undamaged in the March 28, 1979 accident, has remained shut-down by order of the NRC. JCP&L's witness testified that the NRC shutdown order was unlikely to be lifted prior to the resolution of three major issues. Those issues involved (1) the inquiry by the Atomic Safety and Licensing Board as to an incident involving cheating by TMI operators on NRC operator licensing exams; (2) a recent ruling by the U.S. Circuit Court of Appeals requiring an evaluation of psychological distress before a restart of TMI-1,<sup>5</sup> and (3) the discovery of leaks in TMI-1 steam generator tubes.

After evaluating the testimony, the Board reaffirmed its exclusion of TMI-1 from rate base and stated with regard to the criteria to be employed in determining when TMI-1 could appropriately be returned to rate base:

We adopt the Advocate's position and employ the restart criteria developed in Pennsylvania. As we have stated before, when the unit returns to commercial operation after the NCR issues the necessary approvals, an expeditious hearing process will be instituted, the facility's status, i.e., rate base inclusion will be examined, and if appropriate, will be recognized.

JCP&L also argued before the Board that TMI-2, out-of-service since the accident, should be included in rate base as "Plant Held for Future Use," or, as an alternative, the Company's investment in TMI-2 be amortized. In rejecting this proposal the Board concluded in its July 22, 1982 order:

After careful review, the Board finds no compelling reasons to alter its policy that the financial impact associated with the TMI accident should be shared by ratepayers and stockholders. The Board has consistently allowed the pass-through of reasonable replacement energy costs to maintain service for the ratepayer. It has disallowed a

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5. That decision was unanimously reversed by the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, \_\_\_\_ U.S. \_\_\_\_ 75 L.Ed.2d 534 (1983).

return on Petitioner's investment in the TMI facilities sitting idle since March 28, 1979, in recognition of what we believe is the equitable sharing of the cost of the accident.

Given the uncertainty of the future of this facility, it would be unfair to ask the ratepayer, who is the innocent victim of this dilemma, to fund both the replacement power and the investment costs. The investor has borne a share of the consequences from the accident as has the ratepayer. We feel that a balance must be maintained in assessing this loss. To make a mid-course adjustment now would, in our opinion, destroy the foundation of the sharing concept which we have carefully fashioned for 2½ years.

JCP&L proposed during the hearings before the Board that it be permitted to recover through rates, 13.8 million annually for five years towards TMI-2 decontamination costs. This amount claimed represented its proportional share of TMI-2 clean-up costs as set forth in the Bradley-Heinz cost-sharing bill pending before the United States Senate. That cost-sharing reflected the recommendations made by Governor Thornburgh of Pennsylvania that TMI-2 clean-up costs should be spread over a broader base and include contributions from not only New Jersey and Pennsylvania ratepayers, but from the federal government and nuclear industry as a whole.

In its July 22, 1982 order, the Board permitted the requested ratepayer contribution towards decontamination costs. The Board also expressed its belief that an indication of its willingness to recognize decontamination costs in rates would encourage further remedial action on the federal level. Finally, the Board noted the "full endorsement of the Thornburgh Plan" by Governor Kean, as well as the public support for the Thornburgh proposal expressed by the Public Advocate.

JCP&L's rate of return witness testified that an appropriate level for a return on equity for JCP&L would be 23% given the increased risk to the common stockholder demonstrated "by the events of 1979, 1980 and 1981." The Public Advocate's rate of

return witness recommended a return on equity of between 14.84 to 15.69%. After reviewing the competing testimony, the Board determined that a return on equity of 17% was appropriate. In reaching that determination, the Board noted that recent long-term "BBB" rated utility bonds were yielding near 18% and "AAA" utility bonds 16%. That data indicated to the Board that the Public Advocate's recommended return on equity of between 14.84% to 15.69% was too low. The Board also took into consideration the fact that JCP&L had very limited access to traditional money and capital markets. While recognizing the need to mitigate the company's long-term capital costs, the Board acknowledged that restoring JCP&L's standing in financial markets "cannot be accomplished in one Board Order covering say the next year or two." Rather, the Company's financial problems would have to be "systematically" dealt with by the Board "in a consistent and realistic way." Referring to its recent decision granting Public Service Electric and Gas a return on equity of 16%, the Board described its award of a 17% return on equity as reflective of JCP&L's higher risk. The Board also suggested ways in which JCP&L's risk factor could be lessened, such as the company's optimum operation of its Oyster Creek nuclear facility and an expeditious restart of TMI-1.

At the hearing below disagreement arose between JCP&L and the Public Advocate concerning the proper methodology to be employed in the computation of the Company's cash working capital allowance. JCP&L, using the approach taken in its previous rate cases and approved by the Board, used the "1/4 method." This method assumes that a utility on a monthly billing cycle experiences an average lag of 45 days (1/4 of a year) in receipt of payment for services rendered. The level of cash working capital necessary to bridge this gap and permit the company to meet its day-to-day operating expenses and financial obligations while awaiting payment for services rendered is then calculated. The Public Advocate through its witness, recommended that the Company's cash working capital be computed based upon a "lead-lag" study he had conducted in an effort to compute the

actual interval between the date the Company renders a service and the date it receives payment for such services. He testified that in conducting his lead-lag study he had used as a data base the Company's 1980 calendar year operations.

Although he utilized 1980 calendar year data for the computation of lead-lags generally, with respect to lead-lags in the area of the Company's gross receipts and franchise tax collections, the witness recommended that such lead-lags be computed from mid-1979.

The Board in its final order disagreed with this recommended departure from the 1980 date base and calculated all lead-lags upon the Company's 1980 calendar year operations. The overall rate revenue impact of this adjustment amounted to \$4 million out of total revenues of \$1.2 billion.

Following issuance of its July 22, 1982 base rate order, the Board, on September 2, 1982, issued its determination with respect to JCP&L's pending petition for an adjustment in its Levelized Energy Adjustment Clause. Docket A-219-82-T1 involves no challenge to the actual calculation of the company's LEAC but is limited to the question raised by the Public Advocate and other appellants as to the necessity of a TMI-fault determination prior to the passing on of replacement energy costs to ratepayers. Also raised in connection with the LEAC proceeding by the Advocate is the issue of the Board's ability to exclude certain issues from a case transmitted to OAL. Although the Advocate seeks no remedy from the court with respect to any issue excluded by the Board in the LEAC proceeding, other than that related to TMI-fault, it is necessary for a complete understanding of the LEAC portion of this appeal to note the following facts.

During the pendency of JCP&L's main rate case, the Company, on January 29, 1982, filed for an increase in its levelized energy adjustment clause. The matter was referred by the Board to the OAL for hearing. In its January 29, 1982 letter of transmittal, the Board specifically reserved to itself "any and all TMI fault-related issues which any party may raise." On May 24,

1982, the assigned ALJ issued an Initial Decision with respect to the issues before her. In that initial decision, the ALJ addressed certain issues which the Public Advocate had attempted to introduce into the proceeding. One issue related to a proposed interest charge on over-recoveries under the LEAC, the other related to the Advocate's recommendation that the Board adopt a policy encouraging conversion of electrically heated homes within JCP&L's service territory to gas or oil heat. With regard to these two issues the ALJ stated:

Procedural fairness dictates that Rate Counsel's recommendations be rejected out-of-hand in this proceeding. A prehearing conference was held on February 2, 1982. I issued a prehearing order on February 16, 1982, which order included stipulations and a preliminary definition of issues. The order did not include within the statement of issues questions relating to the reasonableness of petitioner's current credit on over-recoveries nor policies concerning electrically heated homes. At no time subsequent to issuance of the prehearing order did Rate Counsel give notice of these issues. Rate Counsel did not raise any questions regarding electrically heated homes and interest on over-recoveries until it filed its initial brief.

In view of the fact that the parties had not been afforded the opportunity to address the issues belatedly raised by the Advocate, the Administrative Law judge rejected the Advocate's recommendations. The ALJ further noted that, by their very nature, such proposals would more appropriately be addressed in a generic proceeding rather than JCP&L's LEAC hearing, since they would affect not only JCP&L, but conceivably all electric utilities. Similarly, issues belatedly raised by Ocean County in the LEAC proceeding dealing with outages at JCP&L's Oyster Creek nuclear plant were rejected by the ALJ as being more appropriate to a base rate case than a LEAC proceeding.

After receipt of the ALJ's Initial Decision, it was determined by the Board that more current data was necessary prior to reaching a final LEAC revenue figure. For that reason, the Board, on July 1, 1982, sent the case back to the OAL for the

limited purpose of updating relevant data. In its letter of transmittal, the Board specifically excluded from consideration in the reopened proceeding those issues already rejected by the ALJ as inappropriate to a LEAC proceeding and continued its reservation of TMI-fault.

After completion of the data update the Board, on September 2, 1982, issued its LEAC determination. In that order, the Board addressed the Advocate's "exceptions" to the Board's reservation of issues in its July 2, 1982 letter sending the case back to the OAL. The Board stated:

As to the Advocate's . . . exception regarding the issues reserved by the Board in its letter of transmittal of July 1, 1982 to the Office of Administrative Law, we have reviewed the Advocate's positions and find that in the main, they relate to issues which are not the subject of a LEAC review, but which are subject to either a generic review or a review within the context of a base rate case. The Board's sole rationale for reserving these issues was to insure that the parties, most especially *[sic]* the Public Advocate, did not embark on a time consuming investigation of unrelated issues.

Appeals from the Board's July 22, 1982 base rate order were filed by the Public Advocate, Ocean County and ratepayer Diane Fahey. Jersey Central filed a cross-appeal.

Appeals from the Board's September 2, 1982 LEAC order were filed by the Public Advocate and Ocean County.

Finally, we were informed at oral argument that a new rate increase application has been filed by JCP&L and is presently pending before the Board.

We affirm the four orders here under review generally for the reasons expressed by the Board of Public Utility Commissioners, with the following observations.

At the outset we recognize the difficulty of the task given to the Board in the regulation of this utility. Jersey Central Power and Light has been virtually devastated by the events at Three Mile Island. Since the date of that accident, the Board has had to

entertain numerous applications from JCP&L for relief in various forms including rate and LEAC applications such as here under review. As the Board stated in its April 23, 1981 order:

Unquestionably this Board and its Staff have been required to devote more time, effort and resources to the problems occasioned by Three Mile Island than has ever been true during the approximately 70 years since the agency was created. It is not an exaggeration to say that we probably have a more intimate knowledge of the regulatory and financial problems associated with this utility than in any other matters subjected to our jurisdiction. This has not been a matter of choice. It has been a matter of sheer necessity.

It has been this type of intensive regulatory monitoring of JCP&L that has gained the Board's primary goal: the maintenance of safe, adequate and proper service for the public. To date, JCP&L's ratepayers have experienced no major disruptions in essential utility services.

Throughout all of the post Three Mile Island proceedings brought by JCP&L, the Advocate has strongly and relentlessly sought to have a fault determination made by the Board. The Advocate's position, briefly stated, has been that JCP&L's rates, in order to be deemed reasonable, must reflect the degree of TMI culpability, if any, attributable to the Company. While the Advocate's position may have a prima facie appeal, especially to ratepayers facing yet another increase in utility bills, the fact remains as the Board points out, that the Advocate's seemingly pro-ratepayer argument fails to give proper emphasis to the Board's primary ratepayer responsibility. That responsibility is to insure continued utility service for the more than two million residents of the territory serviced by JCP&L. In the absence of a currently available alternative to JCP&L's continued existence, the Company must be kept financially able to continue providing such service. As the Board has pointed out:

This utility system has not paid a dividend in two years. It is not, and cannot access [*sic*] financial markets to cover capital costs. It is paying expenses from a revolving line

of short-term bank credit. This sole source of capital is based upon the bank's continuing evaluation of the utility's system revenue flow which the movant seeks to restrict. If we were to stay even consideration of an appropriate level of purchase power costs and base rates in matters currently pending, this could easily be interpreted by the banks as an "adverse change" permitting the banks to restrict their line of credit. Such a consequence would go to the very heart of the financial viability of this utility and its ability to serve its customers.

It must be apparent that a fault inquiry would have placed the Board, the utility and the ratepayer in a "catch 22" situation.

It is apparent that, contrary to the assertions of the Advocate, the Board has not been unmindful of the rate consequences to ratepayers flowing from the Three Mile Island accident and has exerted every effort to protect the ratepayers from undue charges. As the Board states, "For the Advocate and other cross-appellants to now argue that, absent a TMI-fault investigation, ratepayers are being exposed to unreasonable rates is both irresponsible and untrue." Any analysis of whether the Board acted properly in declining to embark upon the proposed fault investigation must begin with a clear understanding of the scope of the Board's discretion in this area. It is certainly true, as the Advocate and other cross-appellants argue, that the Board has the authority to disallow expenses that it finds to be the result of a utility's negligence, imprudence or mismanagement. It does not necessarily follow, however, that the Board must embark on every proposed investigation into alleged utility negligence, imprudence or mismanagement, no matter how futile or detrimental to the public interest such an investigation may be. Nor does it follow that the Board may not, under any circumstances, defer in the exercise of its authority to those other agencies possessing either primary or exclusive jurisdiction over the matters involved.

The Public Advocate has attempted to introduce into the ongoing Three Mile Island fault debate a new "procedural" argument based upon his interpretation of the "single controversy" doctrine. This argument, raised for the first time in his brief challenging the

Board's July 1982 and September 1982 rate orders, appears to be twofold. First, the Advocate argues that the Board has violated the single controversy doctrine by "ignoring" the Three Mile Island fault issue in connection with the setting of JCP&L rates. Inasmuch as an assessment of Three Mile Island's culpability is viewed by the Advocate as a prerequisite to the setting of reasonable rates, nothing short of an actual allocation of fault will indicate that "all" the issues in the case have been resolved.

The Advocate also argues that the "single controversy" doctrine vests in the Office of Administrative Law the independent adjudicatory authority to embark upon an investigation into the causes of the Three Mile Island accident in connection with any Three Mile Island related rate application transmitted to it by the Board. The Advocate regards this authority so paramount that the Board itself may not reserve the Three Mile Island fault issue and thus frustrate the Office of Administrative Law in the exercise of its adjudicatory responsibility to hear it. We disagree.

The simple answer to all of these arguments is that the authority to determine that fault is relevant to any rate proceeding is vested in the Board. In recalling that issue from the Administrative Law judge the Board, in light of its knowledge of the precarious existence of JCP&L and its efforts to balance the needs of the utility and the interests of the ratepayers, simply determined that fault was not relevant to this case before it. As we understand the law as it existed at the time the Board made this decision, the Board acted correctly.

During the pendency of these appeals, the Legislature enacted and the Governor signed L.1982, c.94 dealing with the determination of fault after a power generating accident. That statute which ostensibly seeks to change the power of the Board which we have just mentioned is clearly not applicable here and we see no reason therefore to apply it. There is currently a rate proceeding now before the Board in which JCP&L is the applicant. That proceeding will call L.1982, c.94 into consideration.

The issue of fault has also been raised in connection with the LEAC increases. In the proceeding which resulted in the last of

the five LEAC increases before the base rate order of July 31, 1981, the Advocate made a motion requesting that no increase in the LEAC be granted until the Board decided the issue of fault. The Administrative Law judge in the course of his initial decision, granted an increase acknowledging "that increases pursuant to an adjustment clause must at some point be determined to be just and reasonable in order to be allowed on a permanent basis" and "that an issue which is fundamental to the determination of reasonableness, *i.e.*, the issue of fault, is not being considered in this proceeding." The ALJ denied the Advocate's motion because, the Advocate claims, it was clearly based on the assumption that the increase in the LEAC was interim in nature and that the Board would decide the issue of fault in the base rate case. The Board's failure to decide that issue, it is argued, violates the holding of the Supreme Court in *In re Board's Investigation of the Tele. Cos.*, 66 N.J. 476, 492 (1975).

The Advocate also argues that the Board apparently believes that it is enough for it to determine that JCP&L actually spent additional money on replacement power or to determine that JCP&L could not have purchased that power more cheaply elsewhere. The Advocate argues that that is not enough. He claims that the Board must determine the reasonableness of the utility's actions at Three Mile Island, and whether the utility's negligence caused the increased replacement power costs or at least contributed to their magnitude. Citing *Public Service Coordinated Transport v. State*, 5 N.J. 196 (1950), he claims that the Court held that the Board and reviewing courts cannot "accept the books of account of a public utility at face value in a rate case in which reasonableness is always the primary issue." *Id.* at 218.

The Advocate apparently argues that not only was the pass-through of Three Mile Island replacement energy costs improper for failure on the part of the Board to examine the fault issue, but also because of an alleged failure by the Board to "validate" prior pass-throughs of Three Mile Island replacement energy costs in its final July 1981 base rate order. If the Advocate is contending that every final base rate order must contain specific reference to

prior LEAC proceedings, we regard such as frivolous. For example, *In re Revision of Rates by Redi-Flo Corporation*, 76 N.J. 21 (1978), requires only that there be a nexus between a LEAC proceeding and a base rate case in which a utility's overall financial status is evaluated. The Board's July 1981 base rate order approved rates based upon JCP&L's cost items, one of which was the fuel expense examined in the prior LEAC. By its acceptance of such base rates, therefore, the prior LEAC was authorized "in the context of a pending rate proceeding," as required by *Redi-Flo*. 76 N.J. at 41, n.13. Thus the requisite nexus between a LEAC proceeding and a base rate case in which a company's complete finances are examined existed here. We find that no more explicit validation is required.

In her main and reply briefs, Diane Fahey contends that the assessment of decontamination costs of Three Mile Island 2 to the ratepayers is beyond the authority granted to the Board by the Legislature. We disagree.

Ratemaking is a legislative, not a judicial function, and the Legislature has delegated its ratemaking authority to the Board of Public Utilities. *Public Service Coordinated Transport v. State*, 5 N.J. at 214. The Board is vested with broad discretion limited by the statutory standard prescribing the ratemaking powers of the Board: it must fix just and reasonable rates. *Id.* at 214-215; *N.J.S.A.* 48:2-21(b)(1). It is fundamental that a court which reviews a decision of the Board has to weigh for itself whether the rate is just and reasonable. A legislative body, such as the Board, prescribing a rule for future conduct is not the same as a judicial or quasi-judicial tribunal. Thus, if there is any presumption in favor of the order of the commissioners it depends upon the strength of the reasoning by which it is supported. *Public Service Co. v. Public Utility Bd.*, 84 N.J.L. 463-467 (Sup. Ct. 1913), rev'd in part 37 N.J.L. 581 (E. & A. 1914), aff'd on rehearing 87 N.J.L. 597 (E. & A. 1915), app. diss. 242 U.S. 666 (1917).

The justness and reasonableness of a rate "can only be determined after an examination of a company's property valuation

which constitutes its rate base; its expenses, including income taxes and an allowance for depreciation; and the rate of return developed by relating its income to the rate base." 5 *N.J.* at 216. Here it is contended that clean up costs constitute the Company's expenses and that because Three Mile Island 2 is not in the rate base, expenses related to it cannot be taken into account in setting a rate.

We know of no authority for that assertion nor is any cited to us. The "used and useful" test prevents inclusion in rate base of any facility which is not contributing to the production of energy. That, however, says nothing at all about anything other than a rate base decision. Specificially, it does not say whether expenses of property which is not used and useful can be passed along in some other manner. It does not say that expenses which are incurred in order to have property restored to the used and useful status cannot be passed along to the ratepayer.

In fact, as the Board's brief points out, there are expenses which are not directly linked to base rate items that are routinely passed on. The best example is expenses of amortization of a utility's investments in projects abandoned before they can be included in the rate base. Obviously such projects are not used and useful but the ratepayer is sometimes required to pay a share of the costs.

Reliance is placed on the case of *Office of Consumers Counsel v. PUC*, 67 *Ohio Stat.*2d 153, 423 *N.E.*2d 820 (Sup. Ct. 1981), app. dism. 455 *U.S.* 914, 71 *L.Ed.*2d 455 (1982), aff'd 1 *Ohio St.*3d 22 (Sup. Ct. 1982). That case involved nuclear power plants which, like Forked River, had been abandoned before they were completed. The Public Utility Commission permitted amortization of investment in the four cancelled plants. It believed that "if the expenditures are prudent, amortization should be permitted." It decided that they had been prudent because at the time the decision was made to construct the plants, it was a reasonable decision. Similarly, the decision to terminate construction was reasonable. 423 *N.E.*2d at 825-826.

The Ohio Supreme Court decided that the decision based on prudence applied by the commission was not the correct test. Instead the Ohio statute required that when the Public Utility Commission fixed just and reasonable rates, it had first to determine "the cost to the utility of rendering the public utility service for the test period. . . ." 423 N.E.2d at 826. The cancelled planned expenditures, the court said, did not represent the cost to the utility of rendering public utility service for the test period. The cost also did not come within another provision of the statute allowing adjustment for certain other factors. *Id.*, 827-828.

Thus the Ohio court was not simply deciding whether it believed the record showed that the approved rates were just and reasonable. It was restricted instead by a statutory definition of what was just and reasonable and found that allowance of amortization costs did not fit within that definition. Moreover, it dealt with amortization costs not with clean up costs as we do here.

Our Board of Public Utility Commissioners has broad power to set rates. Obviously someone has to pay for the clean up costs. The Board's decision estimated that it would cost each ratepayer approximately fifty cents per month for his share of these costs. The Board also believed that it was important that New Jersey's ratepayers share in the clean up costs so as not to jeopardize plans for federal money to clean up Three Mile Island 2. The sooner the plant gets back on line the sooner it can produce energy which will be to the benefit of the ratepayers.

It is apparent that the Board took into account the numerous factors involved in allocating clean up costs. It concluded by putting a relatively minimal cost on the ratepayers in order to insure receipt of clean up funds from other sources and introduce some measure of stability into the utility's financial situation. All these considerations, we believe, were reasonable and the result, we think, is that that inclusion of clean up costs in the adjusted rate cannot be found so unjust or unreasonable as to require reversal. We find that the allowance of clean up costs are within the power delegated to the Board of Public Utilities by the Legislature.

In its appeal in the 1981 base rate case JCP&L argues that the rates set by the Board are not just and reasonable because: (1) when the Board removed TMI-1 from the rate base it failed to recognize the interdependence between the rate base and the rate of return; if TMI-1 was not going to be in the rate base, a higher rate of return should have been permitted; (2) the record does not support a finding that 10.68% is an adequate overall rate of return and that 16.5% is an adequate return on equity; (3) the Board failed to refer to the standards established in *Federal Power Commission v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944), and therefore had no way of determining whether it was setting just and reasonable rates. We find that none of these factors show that the rate was unjust or unreasonable.

The Board is not required to use any particular formula in setting just and reasonable rates and because it must consider the public interest as well as the investors' interest, the failure to allow a higher rate of return because of the removal from the rate base of TMI-1 was not error. Certainly the Board did not ignore the interrelationship between the rate base and rate of return. In the rate of return portion of the opinion, the Board recognized that "[c]apital and credit markets reflect the consensus judgment of investors who direct resources to their highest marginal returns. Capital flow in response to risk/reward relationships and failure to compete effectively for funds leads invariably to capital shortages." The Board also said that its ultimate goal was to insure safe, adequate and proper service for the utility customers. It recognized that the Company contended that it needed additional revenues, "including cost and carrying charges that have been disallowed but are still an obligation of the Company." This would include the previous elimination from the rate base of TMI-1 and the removal of AFUDC accruals on Forked River subsequent to April 4, 1979, ordered by the Board. These actions are consistent with past Board policy. Hence, the Board recognized its obligation to investor and consumer interests and understood that the Company wanted the Board in considering

the rate of return, to take into account that TMI-1 had been removed from the rate base.

While it is true that the Board's decision does not closely analyze the relationship between rate of return and the removal of TMI-1 from the rate base, it is also apparent that the Board considered that relationship and apparently decided that the removal of the unit from the rate base did not justify a higher rate of return.

Once TMI-1 was taken out of the rate base, it would not have made sense to raise the rate of return because the utility was not entitled to a rate of return on property which was not part of the base. If the rate on the remaining property could be increased to make up for the loss of TMI-1, the effect would be the same as leaving TMI-1 in the rate base. Such would create a rate based upon property not part of the rate base and could produce an unreasonable rate of return. Accordingly, we conclude that the failure to increase the rate of return merely because TMI-1 was taken out of the rate base did not render the rate of return unjust or unreasonable.

Finally, as to this point, the failure of the Board to refer to the *Hope* standards does not indicate that the decision of the Board violated the Public Utility law. If we can find, as we do, that the rates are just and reasonable and adequately balance consumer and investor interests, the mere failure to refer to *Hope* or specifically to set out the three *Hope* standards as referred to by JCP&L does not render the ultimate decision unjust or unreasonable.

With respect to its appeal and cross-appeal on the 1981 and 1982 base rate orders, JCP&L argues that the Board failed to establish rates which comported with the requirements of the federal and state Constitutions under the standards set forth in *Federal Power Commission v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944). *Hope* basically held that an investor had three interests: that the company have sufficient revenue for operating and capital costs, that the return on equity be commensurate with returns on similar enterprises, and that the company be able to maintain credit and attract capital.

We note at the outset that the three factors which JCP&L cites are not identical to those which we have just mentioned. JCP&L contends that the Board should have made a finding on what its real earnings would have been as a result of the Board's order. We do not read *Hope* to require that. *Hope* does say that the investor does have the right to be concerned with the financial integrity of the company. It does not say, however, that specific findings must be made on the impact of the order on the company's financial integrity.

Any federal constitutional argument must be based on the principle set forth in *Permian Basin Area Rate Cases*, 390 U.S. 747, 20 L.Ed.2d 312 (1968), reh. den. 392 U.S. 917 (1968):

It is, however, plain that the "power to regulate is not a power to destroy," [citations omitted]; and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations. Price control is "unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . ." *Nebbia v. New York*, 291 U.S. 502, 539, 78 L.Ed. 940, 958, 54 S.Ct. 505, 89 A.L.R. 1469. [*Id.* at 769-770]

As the *Permian Basin* case noted, "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards . . . and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." 390 U.S. at 770.

*Federal Power Com. v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), held that a commission was not bound to use any single formula in determining rates. The question for the courts is whether the order, viewed in its entirety, meets the requirements of the act that the rates be just and reasonable; the method employed is not controlling.

*Hope* held that the only question is whether the rates were just and reasonable, and that "involves a balance of the investor and the consumer interests." 320 U.S. at 603. Discussing investor

interests, the Court said there must be enough revenue for operating expenses and capital costs of the business. The return to the equity owner must be commensurate with returns on investments in other enterprises having corresponding risks. The return must be sufficient to assure confidence in the financial integrity of the enterprise so that it can maintain credit and attract capital. 320 U.S. at 603.

We have carefully examined all of the briefs filed by JCP&L, and when we read them together, we believe that the utility's only constitutional argument is that the Constitution was violated because the Board failed to make specific findings pursuant to *Hope's* requirements.

We do not find any constitutional infirmity in the orders of the Board. It appears to us that JCP&L is seeking to ignore the difficult task which the Board has taken on in an attempt to keep that organization vital and still servicing the ratepayers. We believe that if it were not for the activities of this Board, JCP&L and its investors might well be nothing more than history. It does not serve the public well for the utility to take the attitude that it is entitled to everything when in fact it has gotten itself into a position where it must rely on the public to save it.

If we presume that JCP&L could argue that various portions of the order violated the federal Constitution, we find that no such violation occurred. In reaching this conclusion we have considered whether *Hope* sets constitutional requirements for a state court. We think it does but we believe that the three investor-interest criteria cited by JCP&L are not of constitutional dimension, and are not the only criteria which a court must consider in deciding whether a rate set by a utility commission is so high that it exploits consumers or so low that it is confiscatory. It is apparent that the *Permian Basin Area Rate Cases* cited above, 390 U.S. at 790-792, shows that those *Hope* standards are not exclusive. Never the less, insofar as the three investor-interest criteria do apply, we find that they were not violated by the substance of the 1981 order.

The *Permian Basin Area Rate Cases* involved the setting of maximum rates in interstate commerce for the sale of natural gas. The case reviewed an order of the Federal Power Commission which had permitted one maximum price for natural gas produced after January 1, 1961 and a lower price for all other natural gas produced in the Permian Basin. The Court first held that it had no power to set aside a reasonable rate. 390 U.S. at 767. There were, however, some constitutional limitations. The Court said that the commission had the power to set maximum prices and to set different rates for different classes. Nevertheless, the rates had to be calculated so that they would not be arbitrary, discriminatory or demonstrably irrelevant to the legislative policy. 390 U.S. at 769-770. The Court said that "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards." *Id.* at 770.

We think it to be significant that the *Permian Basin* decision is divided into several portions. The portion which discusses the constitutional requirements (which would therefore be applicable to a state court's interpretation of a state statute) does not say that the three specific *Hope* standards to which Jersey Central refers in this case (the investor-interest standards) are of constitutional dimension. It does say that the more general requirements of *Hope* are constitutionally required.

First, the Court, in discussing the propriety of maximum rates, said:

Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or geographical area can never be confiscatory; we hold only that any such rates, determined in conformity with the Natural Gas Act, and intended to "balanc[e] . . . the investor and the consumer interests," are constitutionally permissible. *FPC v. Hope Natural Gas Co.*, *supra*, at 603, 88 L.Ed. at 345. [390 U.S. at 770]

So far the Court had not said that the three specific ways of measuring investor interest must always be examined in a rate proceeding. Rather, a general balancing might well be sufficient to satisfy the Constitution.

It was only after the Court had decided many aspects of whether the commission had violated pertinent constitutional limitations and whether it had abused its statutory authority, that it turned to deciding whether the rate structure the commission had devised should be upheld. The Court then asked what criteria should be used to assess the commission's rate structure. Here it referred to *Hope* again, saying that the *Hope* court had "found appropriate criteria by inquiring whether 'the return to the equity owner [is] commensurate with returns on investments in other enterprises having corresponding risks,' and whether the return was 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital.' *Id.*, at 603, 88 L.Ed. at 345." *Permian Basin Area Rate Cases*, 390 U.S. at 790-791. The Court then made the following statement which we find significant: "These criteria, suitably modified to reflect the special circumstances of area regulation, remain pertinent, but they scarcely exhaust the relevant considerations." *Id.* at 791.

Thus, the *Permian Basin* case not only stands for the proposition that the questions of return on investments, assurance of confidence and financial integrity, and the ability to maintain credit and attract capital, are not criteria of constitutional dimension, it also makes clear that those criteria are not exclusive. Specifically:

The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" of the Commission's orders must be measured as much by the success with which they protect those interest as by the effectiveness with which they "maintain

credit . . . and . . . attract capital." [390 U.S. at 791; footnote omitted]

The Court then looked into three areas, only one of which had to do with the rights of investors. First, it asked whether the commission had abused its authority. Second, it had to decide whether the order was supported by substantial evidence. Third, it had to decide whether the order could reasonably be expected to maintain the financial integrity of the utility, attract capital and compensate investors, "and yet provide appropriate protection for the relevant public interest, both existing and foreseeable." 390 U.S. at 791-792. Hence, the *Hope* criteria to which JCP&L refers in this appeal were considered only in tandem with the public's interest. They would not be sufficient criteria on their own. Consequently, we hold (1) the *Hope* criteria regarding financial integrity, attraction of capital and compensation for investors are not of constitutional dimension; (2) the *Hope* criteria requiring just and reasonable rates and the balancing of investor and consumer interests are of constitutional dimension; (3) even when the specific criteria are used they are not exclusive; rather they should be used together with consideration of the public's interest.

We find that none of the purported errors in the decision which JCP&L apparently asserts in its second reply brief violate those portions of the *Hope* decision which bind us. None of those factors render the rate unjust or unreasonable and none of them show that the commission has failed to balance the interest of the investor and the consumer.

We find no merit to JCP&L's argument that the 1981 and 1982 base rate orders violated *N.J. Const.* (1947), Art. I, ¶ 20, which provides that private property may not be taken for public use without just compensation. In view of what we have stated heretofore in this opinion, we will not give the argument dignity by more than referring to it.

Finally, JCP&L claims that the Board erred in refusing to allow ratepayers to pay carrying charges during the amortization period allowed for its abandoned Farked River plant. The Board

first found that Forked River had been abandoned on April 4, 1979 and it refused to allow AFUDC treatment after that date. Secondly, although the decision is not entirely clear, the Board apparently refused to allow base rate treatment for Forked River; the parties agree that that occurred and JCP&L does not claim that that was error. Third, it adopted its Staff's recommendation of a 15-year amortization period.

JCP&L argues that it began to build the Forked River plant in response to a general policy established by the Board to increase generating capacity. It notes that throughout the construction period the Board approved and encouraged construction. In this rate application, JCP&L wanted to recover over 20 years the \$395 million net investment it had made in the abandoned project. Alternatively, it suggested a 15-year amortization period assuming a lower overall cost of capital during that time. Under the first plan, the Board would have to allow an increase in annual revenues of \$61.5 million and under the second plan, it would have to allow increased revenues of \$52.2 million.

When the Board excluded carrying charges after April 4, 1979, JCP&L claims that that reduced the annual income by \$26.9 million. By refusing to allow carrying charges during the period of amortization, the Board required JCP&L shareholders to pay the carrying charges for 15 years out of the rate of return allowed on property in the rate base. We understand JCP&L's argument as not actually contesting the refusal to put Forked River in the rate base, or the 15-year amortization period, but as contending that carrying charges should be allowed during the 15-year period.

JCP&L says that investors should not have to bear any part of the cost of the abandoned project; the consumers should take the risk of a project which would have benefited them.

The choice of how to treat these carrying costs was a decision to be made by the administrative agency, not by a reviewing court. The decision to disallow carrying costs is part of the overall scheme imposed by the Board and should not be disturbed. In

any event, we do not regard the decision as unfair. The ratepayers have already paid over \$53 million in constructing the project in the form of Construction Work in Progress included in rate bases. Ratepayers will never benefit from the abandoned project. The project is one which investors hoped would provide a profit for them. If that hope is not realized because the investment does not pay off, the investors, not the ratepayers, should be asked to bear the risk.

The orders under appeal are affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ELIZABETH McLAUGHLIN  
Clerk

**A-41**

**Appendix B-2**

**CIVIL ACTION**

**NOTICE OF APPEAL**

**RIKER, DANZIG, SCHERER & HYLAND**  
**Headquarters Plaza II—West Tower**  
**Speedwell Avenue**  
**Morristown, New Jersey 07960**  
**(201) 538-0800**  
**Attorneys for Appellant-Petitioner**  
**Jersey Central Power & Light Company**

**SUPERIOR COURT OF NEW JERSEY**  
**APPELLATE DIVISION**

**Docket Nos.**

**A-162-81T2**

**A-218-82T1**

**A-220-82T1**

**A-227-82T1**

**A-219-82T1**

**A-224-82T1**

**(Consolidated)**

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN  
THE TARIFFS FOR SUCH SERVICE (BPU DOCKET No. 804-285)**

---

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF  
TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELEC-  
TRIC SERVICE AND A REVISION IN DEPRECIATION RATES (BPU  
DOCKET Nos. 818-726, 818-736)**

---

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY LEVELIZED ENERGY ADJUSTMENT (BPU DOCKET  
Nos. 821-75, 818-726)**

TO: Stephen W. Townsend, Clerk  
Supreme Court of New Jersey  
Hughes Justice Complex, CN-970  
Trenton, New Jersey 08625

Elizabeth McLaughlin, Clerk  
Superior Court of New Jersey  
Appellate Division  
Hughes Justice Complex, CN-006  
Trenton, New Jersey 08625

Hon. Robert A. Matthews  
Presiding Judge for Administration  
Appellate Division  
444 Hughes Justice Complex, CN-976  
Trenton, New Jersey 08625

Hon. Melvin P. Antell  
Appellate Division  
P.O. Box 191-M  
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Newark, New Jersey 07102

NOTICE is hereby given that, pursuant to *N.J. Const.* (1947), Art. VI, § V, ¶1 and *R. 2:2-1(a)*, appellant Jersey Central Power & Light Company ("Jersey Central") appeals to the Supreme Court of New Jersey as of right with respect to substantial questions arising under the United States Constitution and the Constitution of the State of New Jersey determined by the Appellate Division of the Superior Court by judgment entered on July 28, 1983 in favor of respondent New Jersey Board of Public Utilities. The appeal is from the holding of the Appellate Division that the specific standards set forth in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603, 610, 88 L.Ed 333, 345, 349 (1944) for determining whether the rates allowed a utility are "just and reasonable", and therefore are sufficient to avoid the constitutional prohibition of taking private property for public use without just compensation, do not rise to constitutional dimension. Jersey Central contends the *Hope Standards* are of constitutional dimension and that the decision of the Appellate Division departs from well settled federal law and contravenes the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, and *N.J. Const.* (1947) Art. I, ¶20.

This matter is entitled to a hearing preference pursuant to *R. 1:2-5(1)* since a state agency is a party.

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JERSEY CENTRAL POWER & LIGHT CO.

BY: WILLIAM F. HYLAND

.....  
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A Member of the Firm

James B. Liberman  
(of the New York Bar)  
Debevoise & Liberman

Jack B. Kirsten  
Kirsten, Friedman & Cherin  
OF COUNSEL

Dated: August 17, 1983

A-45

**CIVIL ACTION  
NOTICE OF PETITION  
FOR CERTIFICATION**

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Jersey Central Power & Light Company

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NOS.**

A-162-81T2

A-218-82T1

A-220-82T1

A-227-82T1

A-219-82T1

A-224-82T1

(Consolidated)

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN  
THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)**

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**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF  
TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELEC-  
TRIC SERVICE AND A REVISION IN DEPRECIATION RATES (BPU  
DOCKET NOS. 818-726, 818-736)**

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**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND  
LIGHT COMPANY LEVELIZED ENERGY ADJUSTMENT (BPU DOCKET  
NOS. 821-75, 818-736)**

To: Stephen W. Townsend, Clerk  
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NOTICE is hereby given that pursuant to R. 2:2-1(b) and R. 2:12 appellant Jersey Central will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of that Court entered on July 28, 1983 in favor of respondent New Jersey Board of Public Utilities.

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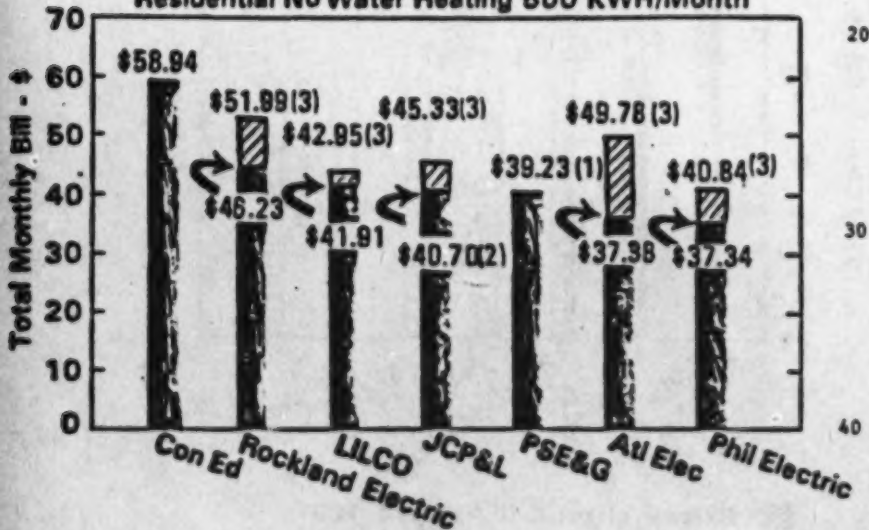
Jack B. Kirsten  
Kirsten, Friedman & Cherin  
OF COUNSEL

Dated: August 17, 1983

\* This bar graph comparing rates in effect for the listed electric utilities was annexed to Jersey Central's April 29, 1980 petition for a rate increase and was reproduced by Jersey Central in the appendices filed in its appeal in Docket No. A-162-81T2.

**Jersey Central Power & Light Company  
Typical Bill Comparisons  
Jersey Central and Neighboring Utilities**

**Residential No Water Heating 500 KWH/Month**



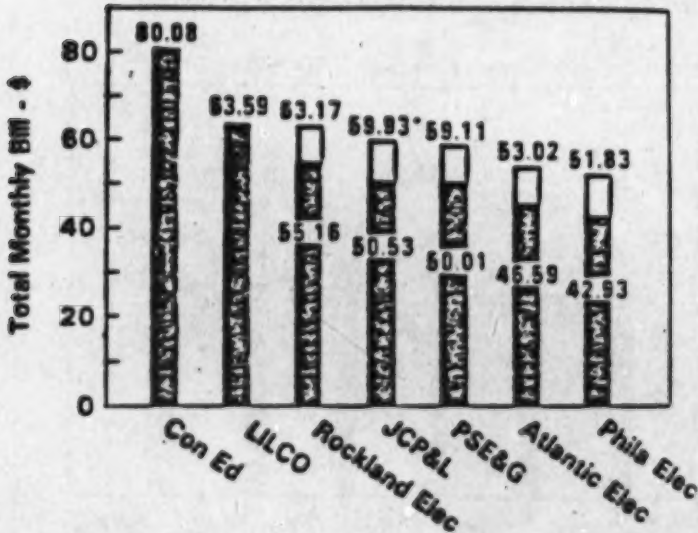
**Rates in Effect April 1980**

- (1) Reflecting rate increase granted 4/14/80.
- (2) Reflecting rate increase granted 4/10/80.
- (3) If pending base rate increase is granted in full.

\* The following graphs and schedules were annexed to Jersey Central's petition for a rate increase filed on August 11, 1981 and were reproduced in the appendices filed by Jersey Central in its appeal in Docket No. A-218-82T1.

### Typical Bill Comparisons Jersey Central and Neighboring Utilities

Residential No Water Heating 500 KWH/Month



■ Rates in effect as of August 1, 1981

□ If pending rate increase were granted in full

¢/Kwh:

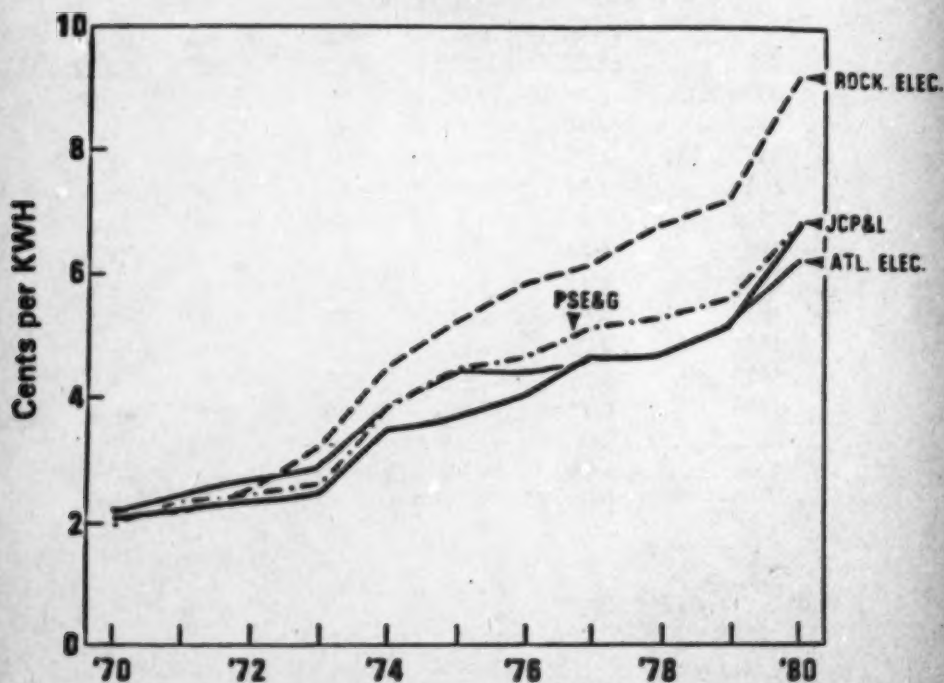
■ 16.0 12.7 11.0 10.1 10.0 9.3 8.6

□ . . 12.6 12.0 11.8 10.6 10.4

\* Stages 1 and 2, plus estimated March 1982 LEAC (reflecting 12 months of TMI-1 generation) and expiration of deferred energy cost surcharge

8/7/81

**New Jersey Utilities  
Average Rate per KWH of Electric Sales  
1970-1980**



**Source: FERC Statistics of Privately Owned  
Electric Utilities in the United States**

**NEW JERSEY UTILITIES**  
**Average Rate per Kwh of Electric Sales\***  
**1970-1980**

(\$/Kwh)					
<u>Year</u>	<u>Atlantic Electric</u>	<u>Jersey Central</u>	<u>Public Service</u>	<u>Rockland Electric</u>	<u>Average</u>
1970 .....	2.19	2.04	1.95	2.22	2.00
1971 .....	2.44	2.17	2.34	2.19	2.31
1972 .....	2.73	2.33	2.46	2.56	2.46
1973 .....	2.90	2.45	2.65	3.30	2.64
1974 .....	3.93	3.46	3.91	4.55	3.81
1975 .....	4.44	3.66	4.47	5.27	4.28
1976 .....	4.44	4.05	4.69	5.87	4.52
1977 .....	4.61	4.68	5.16	6.24	5.00
1978 .....	4.74	4.72	5.33	6.85	5.13
1979 .....	5.24	5.15	5.70	7.32	5.54
1980 .....	6.27	6.79	6.90	9.27	6.84

\* Sales to all customers, including sales for resale (Source: FERC Statistics of Privately Owned Electric Utilities in the United States).

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Appendix C-1

INTERIM ORDER

STATE OF NEW JERSEY  
DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES  
1100 Raymond Blvd.  
Newark, New Jersey 07102

BPU DOCKET NO. 804-285  
BPU DOCKET NO. 803-172  
THIRD AMENDMENT TO PETITION  
BPU DOCKET NO. 795-508A

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY FOR APPROVAL OF AN  
INCREASE IN RATES AND CHARGES FOR ELECTRIC SERVICE.

---

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY FOR APPROVAL OF THE TRANS-  
FER OF ITS INTEREST IN CERTAIN PROPERTY ACQUIRED IN  
CONNECTION WITH THE CONSTRUCTION OF UNIT NO. 7 OF  
THE SEWARD GENERATING STATION.

---

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY: PETITION FOR AUTHORITY TO  
ISSUE, SELL AND REVIEW UP TO \$189,000,000 OF PROMISSORY  
NOTES TO BE OUTSTANDING FOR MORE THAN ONE YEAR: TO  
DELIVER A SUPPLEMENTAL INDENTURE DATED AS OF JUNE  
15, 1979; TO ISSUE THEREUNDER AND SELL OR PLEDGE UP TO  
\$100,000,000 AGGREGATE PRINCIPAL AMOUNT OF THE FIRST  
MORTGAGE BONDS DUE ON OR BEFORE JULY 1, 1986.

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BY THE BOARD  
DOCKET NO. 804-285

This Order addresses the Motion of Jersey Central Power & Light Company, filed April 29, 1980 for interim or emergent rate relief in the amount of \$60 million dollars annually, pursuant to *N.J.S.A. 48:2-21.1*. Petitioner also has pending its main rate application to increase rates in the amount of \$173.5 million dollars, which amount includes the interim request pursuant to *N.J.S.A. 48:2-21*. The main rate request proposed to be effective June 1, 1980 is hereby suspended pending further hearings and full investigation.

After required notice, because of the emergent nature of the Petitioner's request, the Board held immediate hearings which commenced on Monday, May 5, 1980, and continued on May 7, 9 and 12, 1980. In addition thereto the Board held public hearings to permit members of the public in the Petitioner's service territory to be heard. Four such public hearings were held in Hackettstown, Morristown, Freehold and Toms River on the evenings of May 6, 7 and 8, 1980.

At the evidentiary hearings, there was submitted by JCP&L the testimony of Dennis Baldassari, Treasurer of JCP&L, Fred D. Hafer, Vice-President-Rate Case Management of GPU Service Corporation ("GPUSC"). Paul H. Preis, Controller of JCP&L, Eugene F. Carter, Assistant Vice-President-Rates, GPUSC, and numerous exhibits. There was also submitted by the Board's staff the testimony of Anthony J. Zarillo, Executive Officer of the Board, and Dr. Fred Grygiel, Chief Economist of the Board. In addition, Mr. Edward Perrault presented a statement of objection in respect to the rate design issue on behalf of Air Products Company.

Active participants in the current proceedings included the Board's Staff, the Department of the Public Advocate, Division of Rate Counsel, the New Jersey Department of Energy, the County of Ocean, the U.S. Army, Office of Regulatory Law, on behalf of

the U.S. Government executive agencies, the American Association of Water Companies, (New Jersey Chapter) and Air Products Company. There was extensive cross-examination of substantially all the witnesses presented.

The Board is properly authorized pursuant to *N.J.S.A. 48:2-21, 48:2-21.1*, to grant interim emergent relief after notice and hearing. *In Re Revision of the Rates by Redi-Flo Corporation*, 76 N.J. 21 (1978), *In Re Board's Investigation by Telephone Companies*, 66 N.J. 476 (1975).

Indeed, since *Hope*<sup>1</sup> and pursuant to the legal standards we have enunciated,<sup>2</sup> this Board is duty bound to provide necessary funds to a utility on an emergent basis, subject to refund in the event of a financial and service crises. We have defined emergency in rather stringent terms to protect the consumer. There has to be a showing that but for an immediate infusion of rate payer funds Petitioner would not be able to continue to provide safe adequate and proper service or reasonably access the market for needed construction or expense. This may take the form of a coverage crisis, an inability to access the financial markets for needed construction and/or or a cash-flow crisis. Mere attrition in earnings is not sufficient unless it impacts financing, construction, or service. It is our inescapable conclusion, after review of this record, that JCP&L is in an emergent financial crisis impacting its ability to serve customers this day and in the months to come and that a rate increase of \$60 million in base rates is absolutely necessary for continued service. Without such relief Petitioner and its customers will surely suffer irreparable harm unprecedented in electric utility regulatory experience.

With respect to the current motion for interim relief, the Board has given substantial weight to Staff's testimony on the financial condition of the Company.

1. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.ed. 333 (1944).

2. *In the Matter of Jersey Central Power and Light Co.*, Docket No. 743-184 (5/28/74); *Elizabethtown Water Company*, Docket No. 727-606 (9/1/72); *Public Service Electric and Gas Company*, Docket No. 726-362 (5/31/72); and *In the Matter of Public Service Electric and Gas Company*, Docket No. 703-105 (10/29/70).

The Board finds that:

1. JCP&L will exhaust its short-debt limit under the RCA before the end of May.
2. Under current rates, JCP&L does not have sufficient coverages to sell long-term debt.
3. GPU, in its present financial condition, cannot sell common equity at a reasonable price.
4. Under current rates, JCP&L does not have sufficient coverages to sell preferred stock.
5. Overall, under existing rates, JCP&L will not be able to finance construction required to insure safe, adequate, and proper service.

Based on these observations, we conclude that JCP&L is eligible for interim relief.

Since the accident at Three Mile Island on March 28, 1979, the Board has committed significant resources to protecting the long-run interests of the ratepayers in JCP&L's service territory. Most recently, the Board has appealed directly to the Federal Energy Regulatory Commission for relief from the burdensome split-savings formula utilized in the pricing of PJM interchange sales. This formula has resulted in the imposition of 30 to 40% markups on cost for purchase power. These costs are ultimately placed on JCP&L's ratepayers.

In addition, the Board has drawn up an action agenda for soliciting Federal assistance. Most importantly, it is the Board's position that the costs of TMI-2 should be spread over a much broader base than just New Jersey and Pennsylvania ratepayers. The Kemeny and Rogovin investigations clearly establish that the cause of the accident at TMI was not solely limited to operator error but, in fact, was in part related to the structure of nuclear regulation in general.

The Board in Docket 795-427 (Phase I) directed JCP&L to seek out all possible purchase power agreements that would reduce the costs ultimately imposed on ratepayers. To date, the savings from these purchased power agreements have amounted to \$26 million.

Further, the Board is vigorously directing JCP&L to successfully negotiate a contract for low cost power from Ontario Hydro. The Board will personally intercede on behalf of JCP&L ratepayers in these negotiations.

Finally, the Board is conducting two major investigations related to the TMI accident. First, the Board has initiated its inquiry into the question of JCP&L's potential *fault* in the accident. It is our intention to fully explore the underlying causes of the accident and the role played by the respective companies. Second, the Board has commissioned the Strategic Options Study which will determine what is the least cost option of supplying safe, adequate, and reliable service to JCP&L ratepayers.

Since the accident, the Board has taken action on numerous petitions relating principally to adjustments in the LEAC and the financing requirements of the company. Our objective in each of these cases has been a simple one: minimize the cost to ratepayers and keep JCP&L viable. Under present conditions, alternatives to JCP&L would prove extremely costly and potentially disruptive to reliable service.

It should be noted that of the some \$234 million granted in rate relief since June, 1979, only 34% are directly related to the TMI accident. The remaining  $\frac{2}{3}$  of the increases are directly related to forces (principally OPEC oil increases) which are outside the control of this Board, JCP&L, and rate-payers. Unfortunately, all of us are subject to the whims of the powerful OPEC cartel. This Board will do all it can to break this dependence.

The record in this and other proceedings has clearly indicated the serious financial condition of the Company. The tremendous cash requirements imposed upon the Company by the need to purchase substantial replacement power occasioned by the outages of TMI-1, TMI-2 and Oyster Creek have placed the Company in a precarious financial position. In our Order of April 1, 1980, in Docket No. 795-427, was noted that Jersey Central had limited access to funds with which to maintain safe, adequate and proper service as required by *N.J.S.A. 48:2-23*. Since that time, the Company's ability to obtain credit and access capital markets

has further deteriorated. Most recently, the Banks involved in the Revolving Credit Agreement (RCA) have declined to increase the Company's \$139,000,000 loan limit and have further refused to extend credit beyond the \$110,000,000 now outstanding unless the Company agrees to pledge its accounts receivable as security for additional borrowings.

Furthermore, the Company has also requested the Board's approval to realize approximately \$5 million from the sale of its interest in the 625MW Seward Generating Station now under construction. It is apparent that unless the Board approves these requests or provides some other form of relief, the Company may be unable to maintain the present level of safe, adequate and proper service.

#### **Level of Interim Relief**

In approaching the question of the appropriate level of interim, the Board has again used the objective of minimizing the cost to ratepayers and keeping JCP&L viable. It is our conviction that the cost to ratepayers can be minimized by providing the Company a vehicle to begin the process of reducing the costly short-term debt outstanding. Given current prime rates, these marginal rates are estimated to be in excess of 20 percent. Secondly, the Board is convinced that the company's ability to consummate the Ontario Hydro purchase can be positively impacted and can ultimately reduce the cost to Jersey Central ratepayers. We also believe that any relief be sufficient to guarantee continued reliable service.

The Board has reviewed Staff testimony and the Company's case. Based on the review, the Board is convinced that the public interest will be served by granting an increase in base rates of \$60 million. We disagree with Staff on the issue of the \$15 million attributable to acceleration of old deferred energy balances. We are convinced that by allowing the \$15 million in terms of earnings available, the Board will maximize the benefits to ratepayers from the increase.

Let us now turn to the specific evidence that led us to conclude that \$60 million in additional base revenues is the appropriate level of interim relief.

1. We accept the Staff position on the relevant test year, i.e., March 31, 1980
2. We adopt, as a reasonable estimate, a 13.75 rate of return on equity.
3. We adopt the capital structure without short-term debt included, and the respective costs of capital shown on attachment B.
4. We accept the Staff's rate base recommendation except that we recognize an additional \$75,238,000 of construction work in progress. Therefore, for rate making purposes, we will use a net investment rate base of \$1,222,631,000 for the purposes of testing, on an interim base, the reasonableness of the level of relief.
5. The resulting rate of return (10.12 percent) applied to a net investment rate base of \$1,222,631,000 yields an operating income of \$123,730,000 less \$94,935,000 of pro-forma operating income that results in a deficiency in operating income of \$28,795,000 when multiplied by the tax factor (2.1086) results in additional revenue requirements of \$60,717,000 (say \$60 million).

Based on the above analysis, we are satisfied that an interim increase of \$60 million in base revenues is required.

### III. Docket No. 795-508A (Pledge of Accounts Receivable)

The Board has heard extensive testimony by the petitioner as well as representatives of the agent banks on the necessity of JCP&L pledging its accounts receivable for the \$60 million in draw-downs under the RCA. It is clear from that testimony that the Banks are very concerned with the ongoing risk associated with the regulatory environment in New Jersey, Pennsylvania, and the Nuclear Regulatory Commission in Washington. Given these uncertainties, the Banks argue that the pledge is required to justify their increased exposure of \$60 million.

It is our opinion that, at the time of the filing of the petition for pledging the accounts receivable, the Banks had a reasonably sound argument for requesting such a pledge. However, based on the evidence developed in these hearings, the Board now believes that the major concerns of the Banks have been met. In particular, we note that the Banks identified the following factors as support for the request to pledge the accounts receivable.

1. Deterioration of JCP&L's earnings as a result of the Board's decision to remove TMI-1 from base rates.

The Board is convinced that the decision to remove TMI-1 from base rates was justified and totally consistent with its sharing concept enunciated in Docket No. 795-427. The present interim rate relief granted above should totally remove the Banks' concern for JCP&L earning capacity and ultimately coverages. It is clear from our analysis that the interim order should allow JCP&L to sell long-term debt and thereby reduce the financing costs of the firm.

2. Extended outage of Oyster Creek.

It is clear that the Company is well along in receiving NRC approval for the necessary repairs of this unit. We have been advised that written approval is imminent. Therefore, this concern has been substantially removed and may be totally removed in the near future.

3. Question of non-earning assets (i.e., TMI-1, TMI-2, and Forked River).

The Board cannot control the availability of TMI-1 and TMI-2. However, the Board has actively interceded on behalf of Jersey Central ratepayers with the NRC. Specifically, the Board has repeatedly pointed out to the NRC the financial burdens imposed on Jersey Central ratepayers by the continued unavailability of TMI-1. The Board has urged the NRC, subject to all relevant safety and health precautions, to return TMI-1 to service. The issue of Forked River will be addressed by the Board in the main case.

4. Concern with the regulatory environment in Pennsylvania.

The Board takes note that the Pennsylvania Commission has recently awarded Met-ED/Penelec substantial revenue relief, in fact, in excess of what the companies requested. Further, the Pennsylvania Commission has also ruled that the Met-Ed franchise should not be revoked. Clearly, these are extremely positive developments in Pennsylvania.

Overall, we believe that the foundation for the pledge of the accounts receivable has been substantially eroded. Therefore, we are confident that the need for the pledge no longer exists.

However, it is important to note well that the Board continues to share everyone's concern for the expeditious return to service of the Oyster Creek unit. Adverse developments, remote as they may be, still require Board recognition. Therefore, if Oyster Creek suffers a substantial setback in its return date, the Board will review the merits of reinstating the request for the pledge of accounts receivable. In addition, the Board will expeditiously address the impact of such development on the Company's deferred energy balances and possible resolution vis-a-vis a LEAC proceeding. We, therefore, conclude that it is in the public interest to deny the petition for the pledge of accounts receivable without prejudice.

#### IV. Docket 883-172 (Transfer of Seward 7)

The petitioner requested authorization to sell its interest in Seward 7 for some \$5 million. The proceeds of the sale were to be used to shore up an emergency demand for cash. It is recognized by all parties that the foundation for the sale was the pressing need for cash. However, all parties also agree that were the cash position improved, the need to sell Seward 7 would be eliminated. Based on the testimony of Mr. Baldassari, we are convinced that the prospective \$10 million reduction in the PJM interchange bill in and of itself is sufficient to abrogate the need for the sale. But, more importantly, the recommended interim relief surely removes the necessity for selling this potentially economic coal-fired generating capacity. Therefore, the Board

denies JCP&L's petition to sell its interest in Seward 7 without prejudice.

### Rate Design

The petitioner initially proposed that all of the interim increase be allocated to general service customers. Subsequently, petitioner witness Carter developed some alternative approaches to recover any interim increase. After evaluating that testimony and considering fundamental equities, we have concluded that the interim increase should be allocated in the following manner:

<u>Rate Group</u>	<u>Allocated Increase</u>	<u>Overall % Increase</u>
Residential .....	\$ 7,369,568	1.89
General Service .....	50,934,530	11.05
Lighting .....	<u>1,695,902</u>	<u>13.83</u>
Total Retail .....	\$60,000,000	6.95

The residential increase will be effectuated through a \$1.00 per month increase in the customer charge. This will produce some \$7.6 million of the \$60 million in interim relief. The remaining \$53 million will be recovered from the General Service and Lighting customers. On balance, we feel assured that the relevant competing equities have been appropriately addressed.

The Board recognizes that the rate design we hereby adopt is provisional in nature subject to modification in the main proceedings, just as the amount of rate relief provided is provisional, and subject to refund. *In re Sand Rates*, 66 N.J. 12. Considering the present record and cognizant that the parties will address appropriate rate design factors in the main proceedings, such as a detailed identification and allocation of appropriate costs to demand and energy, the Board concludes that its allocation above, is reasonable on an interim basis.

The latest cost of service study in the Jersey Central proceedings Docket No. 7610-1021 (Exhibit JC-202) supports this level of increase on a cost of service basis. We recognize this allocation is provisional and subject to possible modification through up-

dated cost of service and other relevant rate design testimony in the main proceedings. We emphasize that the impact of the above approach is to increase residential bills by 1.9%.

The remainder of the provisional rate increase (approximately \$52.4 million dollars) will be allocated to GS customers on a provisional across-the-board basis between energy and demand charges. Again, we recognize that additional testimony will be required, e.g. comparing cost factors related to peak usage or demand and comparing unitized rates of return, before this rate design may be embodied in a final Order. The effect of this allocation will be to increase GS rates by approximately 11%.

We have therefore cushioned the impact of this increase to the residential customer to the extent that we believe is legally permissible. To go further would fly in the face of *N.J.S.A. 48:3-1* and 4 which prohibits undue preferences in rate making or discrimination in rates between classes. We believe that the above rate design is within the substantial discretion that this Board is permitted to design rates since they are reasonably related to proper purposes such as consistency of treatment, cost of service and conservation. *In re Essex County Welfare Board*, 126 N.J. Super 417.

Special credits were found reasonable to induce all electric consumption, *Rossi v. Carton*, 88 N.J. Super 233. Special concessions to builders for all electric service were found not to be discriminatory. *Watkins v. Atlantic City Electric Company*, 67 PUR 3rd 483. We do not read the post hearing memorandum of the Public Advocate nor the precedents cited therein, including *In re St. Paul Chamber of Commerce*, (251 Northwest Reporter Second Series) 350, as legally requiring another position. Indeed, in that matter the Minnesota Supreme Court found an allocation rates placing a substantial portion of the increase on the commercial and industrial customer to be reasonably related to proper rate-making considerations, such as cost of service and the customer's ability to pay.

The details of the tariff design, are specified in Exhibit A attached hereto and made a part hereof, are substantially accurate subject to technical review by the parties. We recognize that our regulation, *N.J.A.C. 14:1-6.16*, provides for a review period after Board Order, before rates are implemented. But due to the compelling emergent nature of this matter, we waive the technical requirements of our regulation. We stand ready, however, on motion to the Board or in the context of the main proceeding to revise any details of Petition's tariffs which do not comport with this Order.

It is therefore crystal clear to us that unless responsible action is taken by utility management, the financial community, this Board and the appropriate federal agencies, this utility cannot remain viable and provide service to its customers. If the financial community or specific creditors perceive that management is not acting responsibly, by not really perceiving the nature of the financial crisis at hand, insolvency may result. It is in this context that we view management's recent step of awarding substantial raises to its officers as most unfortunate. It is not only the amount of the funds involved, at a time when regular employees are being laid off, that is at issue. Objective consequences and risks flow from management's action. The cash flow from lenders and customers—the life's blood of the utility—could be impaired by their perceptions of that action.

**ADDITION:** Paragraph 2 under **ORDERS** add (with this Order and subject to evidence produced in the main proceedings.)<sup>4</sup>

In addition, the Board is proceeding at the Federal level to obtain relief from the onerous split savings method at the Federal Energy Regulatory Commission. Any relief depends upon a sympathetic response by the utilities, Public Utility Commissions, and Rate Councils that comprise the PJM Power Grid. Any unfounded perception that relief is not urgently needed must, be quickly rectified.

Under normal circumstances we would have no difficulty with the rationale that key management should be rewarded and motivated. Nor would we attempt as a general rule to intrude ourselves into matters which have been usually considered management's prerogative. But management actions including salaries are subject to scrutiny.<sup>1</sup> Where management actions impact on the actions of others which could bring this company to its knees, this Board must act pursuant to a general authority to secure safe, adequate and proper service to New Jersey residents.<sup>2</sup>

We find this management action to be unreasonable and conclude under present circumstances that to merely disallow such increase for rate making purposes<sup>3</sup> would be an insufficient remedy. There is authority under circumstances of financial jeopardy to prohibit dividends, service fees and the like where such actions could deteriorate utility property or impair service to the public.<sup>4</sup> We will therefore Direct and Order that the recent increases to the officers of JCP&L be rescinded forthwith.

Based upon the record in these proceedings, and the findings we have made herein, the Board **ORDERS** as follows:

1. Petitioner is authorized on an interim provisional basis to increase base rates in the amount of \$60 million dollars according to the rate design we have specified herein.
2. The tariff the company has submitted in compliance with this Order is **HEREBY ACCEPTED** for service rendered on and after May 15, 1980, on an interim provisional basis subject to refund, subject to review as to whether it fully comports with this Order and

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1. *Community Utilities Corporation v. Metropolitan Dade County Water and Sewer Board*, 64 FUR 3rd 210, (1966), *New England Tel. and Tel. Co. v. PUC*, 358 A 2d 1,16 (1976).

2. *N.J.S.A.* 48:2-23.

3. *Re K.I.M. Telephone Company*, 13 FUR 3rd 112, (1951).

4. *Elyria Telephone Company v. Public Utilities Commission*, 110 N.E. 2d 59, (1953); citing *Ohio Central Telephone Corporation v. Public Utilities Commission*, 189 N.E. 690, (1934).

subject to evidence produced in the main proceedings.<sup>1</sup>

3. The Petition to sell the Seward #7 coal-fired facility is **DISMISSED** without prejudice.
4. The petition for Board approval of a pledge of accounts receivable as security under RCA is **DISMISSED** without prejudice.
5. Petitioner shall not pay to GPU any dividends during the remainder of 1980.
6. Petitioner shall advise this Board 30 days in advance of any proposed dividends during 1981 so the Board can evaluate the financial condition of petitioner.

DATED: May 13, 1980

BOARD OF PUBLIC UTILITIES  
BY (SIGNED)

(SEAL)

GEORGE H. BARBOUR  
PRESIDENT

EDWARD H. HYNES  
COMMISSIONER

ATTEST:

(SIGNED)

GERALD A. CALABRESE  
SECRETARY

5. JCP&L shall give notice to its customers, by advertisement in newspapers published and circulated in its service areas, to the effect that the Board has authorized JCP&L to increase its rates on an interim basis as herein authorized, which notice shall contain a summary of the new rates and that new rates shall become effective for all service rendered on or after May 15, 1980.

**JERSEY CENTRAL POWER & LIGHT COMPANY**  
**ALTERNATIVE METHOD OF ALLOCATING INTERIM INCREASE REQUEST OF \$60,000,000**  
**(RESIDENTIAL INCREASE TO CUSTOMER CHARGE ONLY/ NON-RES**  
**INCREASE ACROSS BOARD ON BASE REVENUES)**

<u>Line</u>	<u>Rate Group</u>	<u>Norm(1)</u> <u>Cost</u>	<u>Normalized</u> <u>Sales(2)</u> <u>mWh</u>	<u>Normalized</u> <u>Base</u> <u>Revenues(3)</u>	<u>Allocated</u> <u>Increases</u>	<u>Total</u> <u>Normalized</u> <u>Revenues(4)</u>	<u>Overall</u> <u>Increases</u> <u>(7)=(5)+(4)</u>
	(1)	(2)	(3)	(4)	(5)	(6)	
<b>Residential</b>							
1	No-WH .....	474,137	2,868,573	174,650,445	\$ 5,489,969(5)	\$238,243,840	2.30%
2	Unc WH .....	41,157	468,516	23,568,256	480,063(5)	33,954,787	1.41
3	Total Elec. ....	79,159	1,342,932	59,352,529	904,841(5)	89,123,989	1.02
4	Cont WH .....	42,275	403,180	19,918,110	494,695(5)	28,856,207	1.71
5	Total Res. ....	636,767	5,083,201	277,489,340	\$ 7,369,568	\$390,178,823	1.89
<b>General Service</b>							
6	Secondary .....	70,282	4,275,108	198,209,230	\$34,006,211(6)	\$292,984,099	11.61%
7	Primary .....	218	1,418,314	46,420,070	7,898,703(6)	76,899,638	10.27
8	Transmission .....	80	1,832,964	52,708,350	9,029,616(6)	91,011,799	9.92
9	Total GS .....	70,580	7,526,386	297,337,650	\$50,934,530	\$460,895,536	11.05%
<b>Lighting</b>							
10	OL .....	80,884*	11,629	1,298,060	\$ 196,434(6)	\$ 1,555,863	12.63%
11	SL .....	861	87,350	8,769,509	1,449,468(6)	10,705,971	14.01
12	Total Lighting .....	861	98,980	10,067,569	\$ 1,695,902	\$ 12,261,834	13.83%
13	Total Retail .....	708,208	12,708,566	394,953,072	\$60,000,000	\$863,336,193	6.95%

- Notes: (1) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 7  
 (2) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 6  
 (3) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 2  
 (4) Per Exhibit JC-201, Schedule 1, Col. 4  
 (5) Based on \$1 per month increase in cust. charge  
 (6) (\$60,000,000 total increase—\$7,369,568 res. incr.) ÷ \$307,605,219 total norm GS ÷ Lgt. revenues = 17.1209% incr.  
 times Col. (4)  
 (\*) Supplemental service, therefore, not included in customer count

## JERSEY CENTRAL POWER &amp; LIGHT CO.

## COST OF CAPITAL ANALYSIS

(\$000's)

## 13.25% Return on Equity, No Short-Term Debt

	<u>Amount</u>	<u>%</u>	<u>Cost</u>	<u>Rate of Return</u>
Long-Term Debt .....	\$893,682	49.48	8.27%	4.09%
Preferred Stock .....	205,000	11.35	9.17	1.05
Common Equity .....	654,605	36.24	13.25	4.80
Cost Free Capital .....	52,815	2.93	—	—
				<u>9.93%</u>

## 13.75% Return on Equity, Short-Term Debt Included

	<u>Amount</u>	<u>%</u>	<u>Cost</u>	<u>Rate of Return</u>
Long-Term Debt .....	\$893,682	47.65	8.27%	3.94%
Preferred Stock .....	205,000	10.93	9.17	1.00
Common Equity .....	654,605	34.91	13.75	4.81
Short-Term Debt .....	69,027	3.68	15.04	.55
Cost Free Capital .....	52,818	2.83	—	—
				<u>10.30%</u>

**APPENDIX C-2**

**Decision and Order**

**STATE OF NEW JERSEY**

**DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES  
1100 Raymond Blvd.  
Newark, New Jersey 07102**

**DOCKET NO. 804-285  
OAL DOCKET NO. PUC 3518-80**

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL  
POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES  
AND CHANGES IN THE TARIFFS FOR SUCH SERVICE**

**SERVICE LIST ATTACHED**

**BY THE BOARD**

On April 29, 1980, Jersey Central Power & Light Company (Petitioner, Company), a public utility of the State of New Jersey subject to the jurisdiction of the Board of Public Utilities (Board), filed a petition requesting an increase in its rates in the amount of \$173.5 million. At the time of filing, Petitioner requested interim relief in the form of an immediate increase of \$60 million which was granted by the Board, after hearing, by Order dated May 13, 1980.

Subsequent to its ruling on Petitioner's motion for interim relief, the Board transmitted this matter to the Office of Administrative Law for hearings pursuant to *N.J.S.A. 52:14F-1, et seq.* The Board, in addition, transmitted a Levelized Energy Adjustment Clause matter involving the Company, Docket No. 807-488, which was consolidated with the base rate case. This petition was resolved by the Board in an Order dated October 2, 1980.

At the conclusion of the base rate case, at the suggestion of the parties, the briefing of issues was divided into two sections, revenue requirements and rate design. Administrative Law Judge Stephen Marshall submitted his Initial Decision on revenue requirements on May 11, 1981. His Initial Decision on rate design was submitted on March 11, 1981.

## REVENUE REQUIREMENT

### RATE BASE

Petitioner, in its filing, showed its rate base at test year end to be \$1,364,031,000 which was adjusted for certain known and anticipated changes and which included the elimination of TMI-2. The rate base calculation of the Board's Staff of \$1,268,946,000 and Rate Counsel's calculation of \$1,225,166,000 essentially accepted Petitioner's test year end rate base as adjusted except for figures related to TMI-1, construction work in progress and working capital.

The Administrative Law Judge has adopted the position of the Company, placing TMI-1 back into rate base. Staff and Rate Counsel had argued that Petitioner's portion of ownership of TMI-1, of approximately \$97.8 million, continue to be excluded from rate base.

The events stemming from the March 28, 1979 accident at Three Mile Island are adequately set forth by the Administrative Law Judge in his Initial Decision. On June 18, 1979, in Docket No. 795-427, this Board determined that as a result of the severe damage to TMI-2 that Unit was unlikely to return to service for two to four years and, was, therefore, no longer used and useful for rate-making purposes. The basis for the action of the Board in removing TMI-2 from rate base was that ratepayers should not be required to pay both the replacement energy costs related to TMI-2 and the capital and operating expenses associated with that unit.

On April 1, 1980, the Board, in the same docket, determined that the uncertainty associated with the future availability of

TMI-1 warranted its removal from rate base as its continued inclusion would violate the basic ratemaking premise which is not used and useful in rendering utility services for a considerable time. The Board further held that to include TMI-1 in rate base would be inconsistent with the equitable sharing principles previously established for TMI-2. The removal of TMI-1 from Petitioner's rate base was subsequently upheld by the New Jersey Supreme Court in a decision rendered on April 8, 1981. 85 N.J. 520 (1981).

Based upon a review of the record in the pending matter and the Initial Decision, the Board is of the opinion that circumstances have not changed sufficiently to warrant TMI-1 being placed back into rate base at this time. There have been many delays in bringing this unit back on line and we continue to support the treatment of TMI-1 as set forth in the Board's order of April 1, 1980 in Docket No. 795-427. As it is our position that TMI-1 should not be placed back into rate base until restart, we reject that portion of the Initial Decision which calls for its inclusion. At the time of restart, the Board will consider, in expedited proceedings, the appropriate rate base and revenue adjustment related to the TMI-1 return to service.

With regard to CWIP, the Petitioner proposed the inclusion into rate base of \$61,211,000 while Rate Counsel recommended a figure of \$5,943,000. The Administrative Law Judge adopted Staff's recommendation of \$49,719,000 which represents Petitioner's test year end CWIP balance. It should be noted that the Board in recent years has allowed some level of CWIP in rate base due principally to the nature and amount of investment by electric utilities. Indeed, CWIP in the amount of \$54,576,000 was included in rate base in Petitioner's last base rate proceeding in Docket No. 7619-1021. As properly noted by Staff, CWIP without an offset has been accepted by this Board as a necessary mechanism by which the utilities of this State may realize adequate earnings to meet those service demands created by their customers.

Based upon our review of the record, we agree with Staff that the figure of \$49,719,000 may understate the level of construction that Petitioner may be expected to undertake in the next few years. Accordingly, the Board is of the opinion that a figure of \$55 million is justified by the record and that it is not unreasonable to conclude that the company will maintain this level of construction. We therefore accept the inclusion of \$55 million of CWIP into rate base as a representative figure over the short term.

We further adopt the working capital figure of \$136,107,000 recommended by Staff and Rate Counsel and accepted by the Administrative Law Judge.

Based on the foregoing, the Petitioner's rate base is set at a level of \$1,274,223,000.

#### OPERATING INCOME

Petitioner showed its net utility operating income for the twelve months ended December 31, 1980, to be \$111,440,000. After making adjustments thereto, Petitioner calculated its adjusted pro-forma utility income at \$94,586,000 while Staff and Rate Counsel recommended income levels of \$112,237,000 and \$117,813,000, respectively. The differences stem from differing positions on certain proposed adjustments to operating expenses: tree trimming; reclassification of charitable contributions; TMI reserve capacity adjustment and Forked River adjustment.

The position of the Staff and Rate Counsel with regard to these expenses were, for the most part, similar and were accepted by the Administrative Law Judge with the exception of a tree trimming adjustment.

After full consideration, the Board is of the opinion that the record adequately supports the level of tree trimming expense proposed by the Petitioner and accepted by the Administrative Law Judge and we adopt it as reasonable and proper. The Company is **HEREBY ORDERED** to expend the full amount for the purpose indicated.

With regard to the treatment of the charitable contributions as a below the line expense, we find that the testimony presented by Rate Counsel and supported by the Staff is reasonable and therefore adopt it. This results in a downward adjustment in this expense of \$37,000.

We also adopt the downward adjustment to the TMI Reserve capacity adjustment of \$4,839,000 with regard to TMI-1 and \$3,205,000 with regard to TMI-2 as recommended by Staff and Rate Counsel. It should be noted that these expenditures have not been incurred or booked. The record also indicates that the effect of the forecasted obligation to PJM cannot be accurately measured until 1983. While we find that the inclusion of this expenditure is inappropriate at this time, we will not foreclose the possibility of its allowance at a future date.

The procedural history of the Forked River Project, culminating in its abandonment, has been adequately set out in the ALJ's Initial Decision and the filings of the parties.

The total loss of this project booked by Petitioner as of November 30, 1980, was \$413,700,000. Petitioner has recommended that this investment be amortized over a period of 15 to 20 years and that a return on the unamortized portion of the investment be allowed until the investment has been fully written off. Alternatively, the Company suggests that the amortization take place over a 10 year period without the unamortized investment being included in rate base.

Rate Counsel and Staff recommend that there be a sharing of the loss between the Company's stockholders and ratepayers. Staff has adopted Rate Counsel's adjustments to the total loss booked as of November 30, 1980 of \$413,700,000.

These adjustments are:

- (1) \$1 million received from sale of a crane;
- (2) \$2.7 million profit on sale of uranium since November 30, 1980;
- (3) Assignment of enrichment contract in the amount of \$14.6 million;
- (4) Net deferred income tax of \$142.6 million; and

- (5) AFUDC accruals subsequent to April 4, 1979 of \$26.9 million.

It should be noted that inherent in Petitioner's calculation of its Forked River abandonment loss is AFUDC booked on the project subsequent to the decision to suspend construction activities on April 4, 1979. Rate Counsel, supported by Staff, has argued that no rate treatment be permitted for this AFUDC where a project has been suspended indefinitely or abandoned. The Board is of the opinion that the record contains sufficient evidence to support the position that the project was indefinitely suspended as of April 4, 1979 and we adopt the treatment of AFUDC booked subsequent to that date as proposed by Rate Counsel and Staff.

Rate Counsel has recommended that the loss be amortized over a 15 to 20 year period while Staff has suggested a 15 year period. Both parties recommend that the unamortized balance receive no rate base treatment. As there is sufficient support in the record, we adopt the adjustments recommended by Rate Counsel and Staff and the amortization treatment suggested by Staff as both reasonable and consistent with past Board policy regarding abandonments.

Related to the aforementioned adjustment, the Petitioner has made some effort regarding the issue of salvage. The adjustments for salvage recommended by Rate Counsel and Staff occurred during the test year. We add to this the sale of structural steel in the amount of \$862,000 that was approved by the Board on May 7, 1981, in Docket No. 814-416, and hold that all other salvage transactions completed subsequent to the test year be considered in future base rate filings.

The above, including the sale of steel, results in a net abandonment loss of \$225,398,000 and an annual revenue requirement of \$31,684,000.

Rate Counsel recommends that the Board reduce Petitioner's operation and maintenance expense by \$3.9 million that represents non-recurring costs resulting from the Sparger outage. The net of tax effect on income is \$2,106,000. While the Board does not dispute Rate Counsel's analysis of these expenses, we feel that

this recommendation must be rejected in light of the planned shut down of the Oyster Creek nuclear generating facility for refueling for a period of at least 6 months during the life of these rates.

As it is apparent that Petitioner will incur costs far in excess of the amount aforementioned, we will not reduce its operating and maintenance expenses as recommended by Rate Counsel.

### **Rate of Return**

The resolution of issues related to rate of return, in particular that portion dealing with return on equity, is, at best, a complex and controversial undertaking. Capital and credit markets reflect the consensus judgment of investors who direct resources to their highest marginal returns. Capital flow in response to risk/reward relationships and failure to compete effectively for funds leads invariably to capital shortages.

The ultimate purpose of the Board is to insure that the 700,000 customers of the Company continue to receive safe, adequate and proper service. The Board is well aware that the realization of this goal is dependent on the Petitioner's continued viability, both operational and financial.

We are of the opinion that the rate of return methodology utilized by Rate Counsel does not fully take into consideration the present and prospective risks facing the Petitioner and does not accurately reflect capital market realities.

The Company has taken the position that it requires additional revenues in order to maintain its viability despite the regulatory treatment that has been applied to its assets. To support this view, the Company asserts that its true cost to serve its customers includes costs and carrying charges that have been disallowed but are still an obligation of the Company. This would include the previous elimination from rate base of TMI-1 and the removal of AFUDC accruals on Forked River subsequent to April 4, 1979 ordered by the Board herein. These actions are consistent with past Board policy.

The extraordinary events associated with Three Mile Island and their financial impact on the Company further complicates

the measurement of an appropriate rate of return. The Board has been well aware of the extraordinary nature of the TMI accident and the attendant regulatory problems and uncertainties facing the petitioner.

In identifying and dealing with these problems, the Board has taken many unique actions. These include, among others, the approval of an unprecedented Revolving Credit Agreement, the allowance for accelerated amortization of deferred energy balance, intervention in the Federal Energy Regulatory Commission "split savings" proceedings on behalf of Jersey Central rate-payers, support for the early return to service of TMI-1 consistent with public health and safety, financial inducement to the Company to pursue purchases outside the PJM system, and support of Federal sharing of the TMI-2 clean up costs.

Based upon our review of the testimony related to these issues and the risks involved, we are of the opinion that the record adequately supports as reasonable an overall rate of return of 10.68%. This figure is based upon a finding of the cost of equity of 15% which is the highest level allowed a New Jersey utility by the Board as of this time. The Board will continue to monitor this level carefully in subsequent rate filings.

This allowed rate of return applied to the net investment rate base of \$1,274,223,000 results in an operating income requirement of \$136,087,000, less Petitioner's pro forma operating income of \$112,037,000 resulting in an operating income deficiency of \$24,050,000.

Giving effect to the revenue tax factor of 2,1086, Petitioner would be entitled to additional annual revenues of \$50,712,000 over the interim rate relief of \$60,000,000 authorized by the Board in its Order of May 13, 1980 in this docket.

### **RATE DESIGN**

In an era of high electric rates, the question of who pays in what proportion becomes a question of great significance. Rate design has become as essential as the determination of the revenue requirement. When there is no disagreement that the utility is

entitled to a certain amount of money, as is the case here, the division of that amount among the various inter-and intra-class ratepayers is of as great importance as the actual dollar figure. The Board's decision in this case should be a signal to the industry that the matter of rate design is viewed with great importance by this Board.

### Inter-Class Rate Design

The Board is of the opinion that cost of service is the best method for determining which pricing methodology will be used in rate design. However, it must be pointed out that cost of service is subjective in many ways and a cost of service study, for this reason, should be used as a pathfinder or guideline in determining actual-tariff designs rather than as a precise mathematical formula. Therefore, the Board agrees with the Administrative Law Judge's acceptance of Petitioner's data base for the Cost of Service study. As the Judge pointed out, there are inherent problems in any cost of service study caused by the necessary estimations and imprecisions in the data. To reject a study, on this basis, would, in the opinion of the Board, serve no valid purpose at this time.

Historically, allocation of demand has been done by use of a Coincident Peak/Non-Coincident Peak formula. However, today we are seeing new base load plants constructed to replace more expensive plants, not just for expansion of the market for electricity. This phenomenon supports an Average and Excess formula for generation and bulk transmission plant. Average and excess allocates plant on the basis of both class energy use and class coincident peak demand.<sup>1</sup> Both are important in system planning and both are particularly recognizable in generation and bulk transmission plant. This dual dimension in system planning is not as identifiable in other types of plant. Because of this factor, along with the Board's commitment to continuity in

1. The average and excess factor is developed by weighing a class' share of average demand (relative to the system) by system load factor, and weighing a class' coincident peak share by (1-load factor); and then adding the two weights.

rates, subtransmission and distribution plant will be allocated on a non-coincident peak formula. By adopting this new formula the Board is recognizing that capacity is not determined solely by system peak requirements but also by total energy use over the entire year.

Another area of inter-class rate design to be addressed is functionalization of accounts in a proper manner. Based upon the rationale above, that new base load plants are energy-related functions, the Board is of the opinion that the Forked River Abandonment should be allocated on an energy basis for bulk transmission and generation plant. Those who use the most electricity should pay the most for Forked River. The amortization period for this abandonment will be fifteen (15) years.

Transmission maintenance expenses will be functionalized as energy-related since they do not vary with demand. Fuel stock will also be allocated on an energy basis. Distribution system costs will be functionalized according to Jersey Central's "zero size system" approach.

The Board believes that the allocation of fuel costs among customer classes should be on an equalized cents per kwh basis rather than the variable price differential, based on on-peak/off-peak usage, recommended by the Administrative Law Judge.

#### INTRA-CLASS RATE DESIGN

##### *Residential Service:*

The Board adopts the reasoning of the Administrative Law Judge and grants Petitioner's proposed changes regarding increased customer charges and increased summer-winter differential. Additionally, the Board feels that the water heating subsidy should be reduced by 50%, a possible first step toward total elimination in the next rate case. This subsidy has been in effect since 1976 and has resulted in the utility's other customers subsidizing \$4,000,000 each year of this class. The revenues collected through the elimination of this rate should be spread across the initial blocks of both the summer and winter residential service tariff. Another area where one ratepayer subsidizes another is in

the all-electric block of the residential tariff. Fairness requires a shift to reduce this subsidy. Therefore, the Board hereby establishes as Board policy the discontinuation of this subsidy for new all-electric homes by January 1, 1984. The Company is requested to make every effort to put customers and potential customers on notice of this termination. Moreover, as an effort to gradually remove the subsidy which exists for present all-electric homeowners, the tail block of the RS tariff should be increased by 10%.

#### *General Service:*

The Board is of the opinion that the third block of the GS-S tariff should be eliminated as a step towards the termination of the non-cost justified declining block structure.

The Board agrees with the Administrative Law Judge that mandatory time-of-day rates should be implemented in both the GS-P and GS-T classes. In accordance with the average and excess method adopted today, the GS-P a GS-T energy and demand portions should be reallocated with a larger share in the energy portion.

The General Service minimum customer charge ratchet unfairly penalizes high seasonal demand customers and accordingly should be modified to 50% of the present charge. The Board also agrees with the Administrative Law Judge that the level of curtailable credit should be raised to \$2.50 per kwh.

#### STANDARD TERMS AND CONDITIONS:

The Board will allow charges for uncollectible checks in the amount of \$8. This is intended to include any charges that the Company is assessed by its bank.

A late payment charge will be allowed at the Company's overall rate of return. A grace period of 45 days should be allowed, 60 days for governmental entities.

The reconnection charge requested by petitioner is denied but the Company may resubmit it during its next rate case.

The Board also is of the opinion that non-TMI-related Levelized Energy Adjustment Clause rates should be rolled into the base rates adopted in this case. This results in an energy adjustment of 6.265 mills/kwh prior to voltage adjustments.

The Board, in taking a more active role in rate design, wishes to signal to the industry that innovative rate making is an idea whose time has come.

The development of reasonable co-generation projects, and the acceleration of conservative methods or alternative sources of energy, (for instance lowhead hydro projects) are also of major concern to this Board.

After investigation and consideration of the entire record herein, the Board **HEREBY FINDS** that:

1. The petitioner is entitled to revenues in the amount of \$110,712,000 including \$60,000,000 of interim relief.
2. The petitioner's overall rate of return should be 10.68% and its rate of return on equity should be 15%.

Therefore, based upon the foregoing, the Board **HEREBY AUTHORIZES** an increase in rates as specified in this Decision and Order and, **HEREBY ACCEPTS** the tariffs submitted in accordance with the rate design herein, for service rendered on and after the date of this Order.

On Thursday, July 23, 1981, the Board issued an oral decision in this matter. This decision set forth the revenue requirement and the outline for tariff design that the Board wished to be followed in this case. On July 24, 1981 the company submitted proposed tariffs which have been the subject of ongoing discussions among Staff, the Public Advocate, the company and the Intervenor.

The Board is of the opinion that these discussions satisfy the requirements of N. J. A. C. 14:1-6.16 (a) (5) (i), regarding parties opportunity to be heard on proposed tariffs. Based upon the authority found in N. J. A. C. 14:1-1.1 and 14:1-1.2, the Board **HEREBY WAIVES** the five (5) day period for written comments on the proposed tariffs. This waiver is based upon the damage that could be done to the company delaying implementation any

longer and the fact that all parties have had an opportunity to be heard in this matter.

DATED: July 31, 1981  
(SEAL)

BOARD OF PUBLIC UTILITIES  
BY (SIGNED)

EDWARD A. HYNES  
COMMISSIONER

BARBARA A. CURRAN  
COMMISSIONER

ATTEST:  
(SIGNED)

GERALD A. CALABRESE  
SECRETARY

**APPENDIX C-3**

**DECISION AND ORDER**

**STATE OF NEW JERSEY  
DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES**

1100 Raymond Blvd.  
Newark, New Jersey 07102

BPU-DOCKET No. 818-726  
BPU-DOCKET No. 818-736  
OAL DKT. No. PUC 6152-81

**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER  
AND LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS  
TARIFF TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES  
FOR ELECTRIC SERVICE AND A REVISION IN DEPRECIATION RATES**

Jack B. Kirsten, Esq., and Dolores M. Delabar, Esq., for the  
petitioner, Jersey Central Power and Light Company,  
William F. Hyland, Esq., and James Liberman, Esq., of  
the New York Bar, of Counsel (Kirsten, Friedman &  
Cherin, Attorneys)

Alfred Nardelli, Director, Division of Rate Counsel, Public  
Advocate, Raymond E. Makul, Deputy Public Advocate,  
William Roughton, Assistant Deputy Public Advocate,  
Linda Lodenkamper, Assistant Deputy Public Advocate,  
for the Division of Rate Counsel, Intervenor

I. Paul Slevin and Lucie Hirmina, for the Staff of the Board  
of Public Utilities

Diane Fahey, Intervenor, *pro se*

Robert Westreich, Esq., Assistant Essex County Counsel, for  
the Counties of Essex, Sussex, Warren, Mercer and Mon-  
mouth, and the New Jersey Association of Counties,  
Intervenor (David Ben Asher, Essex County Counsel,  
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for the County of Ocean, Intervenor (Berry, Summerill,

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Cornelius Turner, Esq., for the Federal Executive Agencies,  
Intervenor

Richard B. McGlynn, Esq., for Air Products Company,  
Intervenor (Stryker, Tams & Dill, Attorneys)

William R. Watkins, Esq., for Industrial Energy Users,  
Intervenor (Lindaberry, McCormick & Estabrook,  
Attorneys)

Ann S. Babineau, Esq., for the Middlesex County Utilities  
Authority, Intervenor (Wilentz, Goldman & Spitzer,  
Attorneys)

John Quain, Esq., of the Pennsylvania Bar, for the American  
Society of Utility Investors, Participant

BY THE BOARD:

## I. INTRODUCTION

On August 11, 1981, Jersey Central Power and Light Company (JCP&L or Petitioner) filed a petition with the Board of Public Utilities (Board), pursuant to *N.J.S.A.* 48:2-21 and 48:2-21.1, seeking an increase in its charges to retail electric customers of approximately \$238.5 million annually to become effective for service rendered on and after September 15, 1981. This requested amount was later reduced to \$215.4 million. Petitioner also filed a motion for interim relief (Stage I) requesting \$42.5 million on an annual basis to become effective October 1, 1981. This reflected the revenue impact associated with the anticipated return to service of TMI Unit No. 1.

On September 4, 1981, the Board informed all parties to the proceeding that it would retain the Stage I issues including the request for cessation of depreciation on TMI-I (Docket No. 818-736), and indicated that a record would be developed on the remaining issues (Stage II) by the Office of Administrative Law. On January 8, 1982, the Petitioner filed a stipulation to Stage I, which resolved most of the cost issues involved and left unresolved

the timing of the implementation of the interim relief. This issue was ultimately heard in Stage III.

After notice, four public hearings on the Stage II request were held throughout the Petitioner's service territory on November 2, 4, 5 and December 8, 1981. Evidentiary hearings were held on twenty days from November 16, 1981 through March 5, 1982 before Administrative Law Judges Walter F. Sullivan and Ronald I. Parker. Active parties to the base rate proceedings included the Board's Staff, the Department of the Public Advocate, Division of Rate Counsel, the U.S. Army, the County of Essex and Joint Counties Association, Air Products, Ocean County Board of Chosen Freeholders, Industrial Electric Energy Users Association, and the American Society of Utility Investors.

The Public Advocate and County of Ocean once again put forth their motion regarding the "Fault" issue. This has been a continuing motion in all of Petitioner's proceedings since the March 28, 1979 incident at Three Mile Island, seeking no rate increases until the Board determines Petitioner's responsibility in the incident. When it became evident that these parties viewed certain TMI-II issues in Stage II as related to the issue of "Fault", the Board requested that all TMI issues be returned to the Board for determination. This was in conformance with the Board's oft repeated position on the "Fault" issue.

The record in Stage II was completed before Administrative Law Judge Ronald Parker on March 5, 1982. Petitioner at that time argued that a revenue requirement determination by Judge Parker would be extremely difficult due to the fact that the case has been divided into three segments. With the consent of all the parties, Judge Parker issued an order in which he indicated that he would determine only the factual issues raised in the record before him, and return the record to the Board without an ultimate revenue requirement recommendation. Those issues to be decided included (1) the appropriate level of cash working capital allowance; (2) Oyster Creek depreciation rate; (3) the appropriate level of construction work in progress (CWIP); and (4) the rate of return.

In addition to the aforementioned TMI-I stipulation, the parties reached an agreement on the tariff design issues on March 5, 1982.

Evidentiary hearings on Stage III, the TMI issues retained by the Board, were held on May 10, 14 and 26, 1982, at which time testimony was elicited from Company and Public Advocate witnesses regarding:

1. The regulatory treatment of the TMI-I and the issue of TMI-I depreciation in Docket No. 818-736.
2. The regulatory treatment of the investment in TMI-II.
3. The TMI-II decontamination costs.

The complexity of this case and its division into three discrete segments for hearing purposes results in the need to examine each stage separately. The ensuing discussion will be on a stage basis.

## II. STAGE I (TMI-I)

The parties in Stage I stipulated to a non-contested rate base of \$96,284,000. During the Stage III proceedings, Petitioner presented testimony in support of TMI-I related costs that were not included in the stipulation submitted to the Board on January 8, 1982. These included certain plant additions and projected investments since September 30, 1981 through June 30, 1982 totalling \$6,581,000; completed nuclear fuel assemblies in the amount of \$11,474,000; depreciation adjustment related to the proposed change in the depreciation rate; and, certain health and safety—operating and maintenance expenses incurred at TMI-I from May, 1980 to December, 1981 in the amount of \$7,630,000.

### 1. PLANT ADDITIONS

A review of the record in Stage II and Stage III leads the Board to find that the \$6,581,000 of plant additions placed into service as of June 30, 1982, should be included in the calculation of Petitioner's TMI-I rate base. Testimony of Petitioner's witnesses indicates that these additions represent costs associated with

TMI-II "lessons learned" required by NRC applicable to all nuclear facilities and also unique to TMI-I.

## 2. HEALTH AND SAFETY OPERATION AND MAINTENANCE EXPENSE

Petitioner is seeking to recover certain operating and maintenance (O&M) costs related to the public health and safety of the unit and costs incurred for restart, from May, 1980 to December, 1981. It proposes that these costs be capitalized and amortized over 21 months, which is the length of the period during which Petitioner incurred these costs. The treatment, sought by Petitioner is purportedly due to the extraordinary levels of expense and to the nature of the items.

The Public Advocate argued that the Board was explicit in its Decision and Order of April 1, 1980, in Docket No. 795-427, when it ordered that the TMI-I investment and associated O&M be removed from base rates, and therefore, the health and safety O&M should be disallowed. It did, however, suggest that an amortization period, of 5 to 8 years, without rate base treatment would be appropriate if the Board chose to recognize these costs.

Staff was in basic agreement with the Public Advocate's amortization position. It agreed with the Public Advocate's interpretation of the Board's April 1, 1980 Decision and Order, in that the ratepayers were not to bear any costs related to the TMI-I investment or O&M until such time as the unit resumes operation and is returned to rate base. The record shows that the O&M costs were incurred for quality assurance, training and other safety expenditures required prior to restart. Therefore, the Board will recognize the health and safety O&M as legitimate costs to be recovered through the base rates when TMI-I is returned to rate base.

We reject Petitioner's request to capitalize the unamortized balance and the 21-month period of recovery. As the Public Advocate pointed out — , "The expenses which are amortized to future periods for ratemaking purposes . . . are recognized in rates through an amortization process which does not involve a return

on an unrecovered balance." (RCT-2A, Page 16) This has been the Board's position relative to these types of amortizations. Likewise, the period for recovery in those instances as noted in the record, has been 3 to 5 years. However, we are persuaded by the Public Advocate's and Staff's argument hereto and feel that the upper bound suggested (8 years) is not an unreasonable recovery period and reflects the Board's sharing philosophy which we have employed since the TMI accident in 1979.

### 3. DEPRECIATION ON TMI

The Petitioner proposed a change in the calculation of its depreciation rates to 3.33% to reflect its level of investment through 1984. This issue was also litigated in Stage II before the Administrative law Judge regarding Oyster Creek investment through 1984. In both instances, Petitioner's argument would result in the recovery of its total investment over the remaining life of the plants.

Staff and the Public Advocate argue that only end of test year investment (as of June, 1982) be recognized in the calculations resulting in a 3.29% rate. After review and consideration of the recommendation and reasoning of the Administrative Law Judge in his discussion of the issue in Stage II, the Board adopts the position of Staff and the Public Advocate. To go beyond the test year levels of investment would be too speculative and contrary to accepted regulatory policy.

### 4. NUCLEAR FUEL

Petitioner in its Stage I request, includes in its rate base calculation \$24,763,000 for nuclear fuel. In the stipulation submitted to the Board on January 8, 1982, the uncontested nuclear fuel was reflected as \$13,287,000. The balance of \$11,474,000 that Petitioner seeks to earn a return on represents 103 completed fuel assemblies presently being stored off-site. This represents two refuelings ( $\frac{2}{3}$  of the core). Petitioner testified that because the assemblies are complete, it must cease booking AFDC and

requests rate base treatment as if it were plant or nuclear fuel in service.

The Public Advocate noted that Petitioner normally had 25 to 30 spare assemblies on site after a refueling. (TMI-I had just been refueled at the time of the accident). The Public Advocate further argued that the fuel will not be used until 1984 or 1985 at the earliest because the unit has a full core and will not be refueled until 10 months after restart, at which time one-third of the core will be replaced. Therefore, it argues that to permit Petitioner to earn a return on this investment would be improper in that the fuel is not currently used and useful.

The Staff agreed with the position of the Public Advocate but would allow  $\frac{1}{3}$  of the core or \$5,737,000 in the calculation of TMI-I related rate base.

After review, the Board finds that Staff's position on this issue is meritorious and will adopt it. Assuming a restart of TMI-I during the first quarter of 1983 as now appears likely, this portion of the fuel assemblies would be installed in the facility during its first post restart fueling. This would occur during the first quarter of 1984 or within the foreseeable future.

Therefore, based upon the foregoing, the Board finds that the total net investment of TMI-I Unit I based upon additions through the test year ended June 30, 1982 to be utilized in adjusting the Petitioner's rate base when Unit I returns to service is \$108,602,000, and that the income requirement based on the foregoing adjustments and the rate of return discussed following is \$12,293,000.

### III. STAGE II

Those issues remaining in controversy are:

#### 1. CONSTRUCTION WORK IN PROGRESS (CWIP)

Petitioner, in Exhibit JC-201 showed Construction Work in Progress (CWIP) to be \$89,124,000. This figure was subsequently reduced to \$80,300,000 which includes the following:

Generating projects not accruing AFDC .....	\$ 57,000
Projects under \$5,000 (No AFDC accrued) .....	25,812,000
Projects waiting and/or in service—not complete .....	9,216,000
Accumulated AFDC .....	9,281,000
Investment in Nuclear Fuel Raw Materials .....	<u>35,934,000</u>
	<u>\$80,300,000</u>

Petitioner does not book AFDC on small projects of short duration. Traditionally, these have been projects that cost \$5,000 or less. The record shows that Petitioner's CWIP in which carrying charges (AFDC) are not now being booked is \$25,812,000 at test year ended June 30, 1982. The Public Advocate excluded the \$25,812,000 from its CWIP calculation. It contends that there is no accounting practice or procedural impediment for Petitioner to accrue AFDC on these projects. While this may be the case, Petitioner does not now book AFDC on small projects of short duration, and has not sought to change this policy. The issue was also raised by the Public Advocate in Petitioner's last base rate case. The Board, in that matter, decided to continue treating those costs in the manner set forth by Petitioner in this pending case. After review, we see no reason to deviate from our prior position and therefore adopt the Staff and the company's position.

Petitioner's inactive work orders total \$3,886,000 and its "work orders in-service-not completed" amount to \$5,330,000. The former represent projects which have been suspended with no work performed for more than three months. The record does not indicate when activity will resume on these work orders. The Advocate and Staff, therefore, eliminate the \$3,886,000 from its recommended level of CWIP. As to the remaining \$5,330,000, this represents projects which should properly be considered plant-in-service; however, the Petitioner's bookkeeping practices prevent such designations. The Advocate and Staff have included this amount in their rate base calculations.

Petitioner also includes in its CWIP calculation accumulated AFDC of \$9,281,000. In effect, Petitioner is seeking a return on previously booked AFDC applicable to construction projects not yet completed. The computation to book AFDC on the accumulated AFDC, is made twice a year in accordance with Petitioner's present policy. The Public Advocate's witness recommended that the Board permit Petitioner to compound AFDC monthly and, therefore, recommended elimination of the above amount from CWIP. The Staff rejected this position, arguing that the Board has not permitted the compounding of AFDC on a monthly basis. We agree with Staff and adopt this position.

The last element included in Petitioner's CWIP is nuclear fuel in process, which equates to \$35,934,000. This represents investment in nuclear fuel and raw materials for TMI-I and Oyster Creek. The Public Advocate recommended that this nuclear fuel in process should not be included in CWIP calculations. It contended that current customers should not have to pay for this additional investment at this time in view of the uncertainty surrounding the restart of TMI-I, and the questionable status and reliability of Oyster Creek. Staff concurred in this view.

After review, we find the Staff's and Advocate's position on nuclear fuel to be persuasive. Petitioner expects that, during the next 36 months, Oyster Creek nuclear station will be out of service for approximately 20 months. Further, TMI-I restart has been delayed due to legal and technical problems. To require the present ratepayers to absorb the cost of this investment at this time would be unjustifiable.

The question of nuclear fuel assemblies currently in storage and nuclear fuel in process is troubling to the Board. Considering the questionable status of the Petitioner's nuclear program (restart of TMI-I and II and the forecast extended outages at the Oyster Creek facility), the Board would direct the Petitioner to investigate the possibility of selling all or part of the inventory currently on hand. Such a sale would give an immediate positive cash flow advantage to the Petitioner and serve to reduce the level

of short term borrowings. The Petitioner is to report to the Board within 90 days on potential buyers contacted.

## 2. WORKING CAPITAL

Petitioner's filing initially reflected a level of Working Capital in the amount of \$149,093,000 which was modified to \$150,756,000. Both analyses include an appropriate amount for materials and supplies, and cash working capital based upon the FPC  $\frac{1}{2}$  of operating and maintenance expenses method of \$96,153,000. However, the Petitioner, in response to the Public Advocate's request X-79, provided the various leads and lags associated with Petitioner's revenue and expense accounts for the calendar year 1980. Based on the above mentioned lead-lag study, the Public Advocate argued that the cash working capital allowance should be \$44,495,000. The Public Advocate calculated the lag period for 1980, from the midpoint of 1979 to each payment date, concluding that the weighted tax lag period is 187.4 days.

In view of the fact that the lead-lag study (X-79) represents Petitioner's calendar year 1980 operations, Staff argued that it is more appropriate to begin the calculation of the lag period at the end of 1979 or from the beginning of 1980.

The Administrative Law Judge adopted the Public Advocate's reasoning regarding the use of a Lead-Lag study but recommended a further adjustment reflective of the Petitioner's assertion that funds accrued for the payment of debt interest and preferred stock dividends should not be included in the cash working capital analysis. Staff and the Advocate argued that these funds are available for general corporate use until actually paid and as such should be included.

We concur with the position of Staff and find that the lag period for all taxes is 114.9 days. We further adopt the position of Rate Council and Staff as regards the treatment of funds for debt and preferred stock payments.

Based upon the foregoing, the cash working capital required by Petitioner equals \$66,740,000 and the total working capital allowance is \$120,731,000.

### 3. *The Depreciation Rate on Oyster Creek*

As stated by the Board in its discussion of the treatment of TMI depreciation, we adopt the position of Rate Counsel and Staff regarding the use of test year end investments in the calculation of depreciation rates. Therefore, we adopt the ALJ's recommendation and find a 3.75% rate to be reasonable.

### 4. *Rate of Return*

The parties in this proceeding faced the continuing difficulties of estimating a market oriented cost of capital for a company that has limited access to traditional money and capital markets. Further complicating the issue are the apparent differences of opinion regarding the present stage of the recovery of JCP&L and, in fact, the ultimate desirability of accomplishing that recovery. The Board has reviewed the record on these issues and determined that the costs of capital and capital structure set forth below adequately meet the legal and regulatory standards associated with the issues:

<u>Capital Structure (\$00)</u>		<u>Per Cent Weight</u>	<u>Cost (%)</u>	<u>Weighted Cost</u>
Long-Term	\$ 893,000	47.40	8.41	3.99
Short-Term Debt	20,000	1.06	17.00	0.18
Preferred Stock	200,000	10.62	9.08	0.96
Common Stock	685,944	36.42	17.00	6.19
Cost Free Capital	84,690	4.50	—	—
	<u>\$1,833,647</u>	<u>100.00%</u>	<u>—</u>	<u>11.32%</u>

In reaching its determination on the appropriate return on equity for JCP&L, the Board considered the following factors:

- (1) Current and prospective bond ratings of JCP&L (Moody's: Ba and S&P: BB-).

Recent long-term "BBB" rated utility bonds are yielding near 18 percent. Even utility bonds rated "AAA" are priced to yield in excess of 16 percent. It, therefore, appears obvious that the Public Advocate's return on equity assessment of between 14.84 to 15.69 (recommended 15.69) was insufficient when filed (Staff Position: April 7, 1982, p. 10), and capital markets have not produced interest rates to support that assessment. Reestablishment of investment grade debt ratings will benefit ratepayers in lower costs of capital.

(2) Very limited access to traditional money and capital markets.

It is clearly the intent of the Board to mitigate the long-term costs of capital to the Petitioner. However, this cannot be accomplished in one Board Order covering say the next year or two. Therefore, the Board must systematically deal with the Petitioner's financial problems in a consistent and realistic way. Our rate of return determination is totally reflective of that position. Ratepayers will benefit from this strategy.

(3) Current and prospective high market interest rates.

All of our regulated utilities face the market-determined costs of capital. Current economic forces have produced interest rates which the utilities must pay if they intend to attract the capital required to meet their franchise responsibilities. This is clearly a fact facing the Petitioner. Although at times unpopular, the Board must exercise its authority to assess these market-determined costs on the users of utility services. Petitioner faces substantial problems which require voluntary capital. The Board cannot ignore these legitimate needs.

(4) Substantial risks associated with JCP&L's nuclear properties (i.e., TMI-I, TMI-II, and Oyster Creek).

The record fully supports these risks and their impact on the firm's cost of capital. Our determination on rate of return is a reasonable estimate at quantifying these risks. We are hopeful that these risks will be substantially reduced as a result of the Petitioner's efforts to expeditiously restart TMI-I and minimize the downtime of Oyster Creek. The Board will continue to support all efforts

aimed at mitigating these risks and passing on the benefits to JCP&L's ratepayers.

- (5) Continuing need to assure safe, adequate, and proper service via substantial long-term purchased power agreements.

The Board has continually insisted that the Petitioner pursue all purchased power agreements that will result in lower cost power and energy. In order to successfully execute this responsibility, the Petitioner must negotiate contracts for five and ten years into the future. Ratepayer benefits should not be foregone because the company is viewed as incapable of meeting these contractual agreements.

The overwhelming evidence in the record supports our determination that a return on equity of 17% and an overall return of 11.32% are reasonable approximations of the Petitioner's costs of capital. As noted previously, the differential risks faced by JCP&L are greater than most electric utilities. The Board's recent action in Docket 812-76 indicated its assessment of the record evidence concerning the cost of equity to PSE&G, namely 16.0% (*Decision and Order*, February 11, 1982, p. 8). Our underlying assessment of the record evidence in this proceeding clearly indicates the unrebuttable higher risk faced by JCP&L.

#### IV. STAGE III (TMI-RELATED ISSUES)

The issues before the Board in Stage III are:

1. The regulatory treatment of TMI-I and the issue of the cessation of depreciation in Docket No. 818-736.
2. The regulatory treatment of TMI-II.
3. TMI-II decontamination costs.

##### 1. RETURN OF TMI-I TO RATE BASE

The discussion in the Stage I section set forth those issues that were not stipulated by Staff, the Public Advocate and Petitioner. The question of the timing, that is, when the TMI-I unit will be returned to rate base must also be determined. Staff suggested that the commercial operation of the unit would be the triggering

event. The Public Advocate pointed to the recent Petition for Settlement in Pennsylvania wherein the return to rate base would be guided by the following:

1. An order issued by the NRC authorizing normal operation of the plant.
2. The plant has begun to produce electric energy for the system and achieves and maintains a capacity factor of 35% for at least 100 consecutive hours; and
3. The company has given 10 days notice of a rate change to the Board and to all parties to the proceeding.

The Advocate would desire a similar set of circumstances before the Board would act on a return to service of TMI-I.

The Petitioner argued as it has done since January 1980, when the Board removed TMI-I from rate base, that the unit should not have been removed and should immediately be returned to rate base. We cannot find any merit in Petitioner's arguments.

We adopt the Advocate's position and employ the restart criteria developed in Pennsylvania. As we have stated before, when the unit returns to commercial operation after the NRC issues the necessary approvals, an expeditious hearing process will be instituted, the facility's status, i.e., rate base inclusion will be examined, and if appropriate, will be recognized.

## 2. TMI-II INVESTMENT

Petitioner, in its Stage II testimony and more recently in the Stage III proceeding, requested an increase in annual revenue of \$35.3 million to reflect a recovery on its TMI-II investment. Petitioner believes that the investment in TMI-II should be included in rate base as "Plant Held for Future Use" (FERC Account 105).

Petitioner alternatively suggested that the Board permit the amortization of the TMI-II investment with carrying costs associated with the unamortized balance, in an amount equivalent to the \$35 million initially requested, if the Board determined that it was inappropriate to recognize TMI-II as plant held for future use.

The Public Advocate argued that the investment does not fit the definitions of plant held for future use as set out in the *FERC Uniform System of Accounts*. Account 105 refers to "...definite plans, never used and retired." (RCT 24 p. 21). The Public Advocate's witness suggests that nothing is definite as to the status of TMI-II. No decision has been made regarding restart or reconstruction. Although technically feasible, the financial and regulatory problems may inordinately delay or even preclude such action. Additionally, the facility is not one which was "never used" and is not "retired."

As to the Petitioner's alternate proposal, the Public Advocate compared it to the treatment sought by Petitioner and other New Jersey utilities for abandoned plants or projects, arguing that the same cost recovery methods should be applied to TMI-II. That is, Petitioner should not be afforded a return on carrying charges on any unamortized investment. The Staff concurred in this view.

After careful review, the Board finds no compelling reasons to alter its policy that the financial impact associated with the TMI accident should be shared by ratepayers and stockholders. The Board has consistently allowed the pass-through of reasonable replacement energy costs to maintain service for the ratepayer. It has disallowed a return on Petitioner's investment in the TMI facilities sitting idle since March 28, 1979, in recognition of what we believe is the equitable sharing of the cost of the accident.

Given the uncertainty of the future of this facility, it would be unfair to ask the ratepayer, who is the innocent victim of this dilemma, to fund both the replacement power and the investment costs. The investor has borne a share of the consequences from the accident as has the ratepayer. We feel that a balance must be maintained in assessing this loss. To make a mid-course adjustment now would, in our opinion, destroy the foundation of the sharing concept which we have carefully fashioned for 2½ years.

We will therefore adopt the recommendation of the Staff and Rate Counsel. If, in fact, Petitioner at some future date, decides

to abandon the TMI-II facility, the Board will at that time undertake a full investigation into the circumstances surrounding the accident before making any decision.

### 3. TMI-2 DECONTAMINATION

Petitioner proposes that it be allowed to recover, through rates, \$13.8 million annually (including revenue taxes) for a five year period covering its proportional (25%) shares of TMI-2 decontamination costs as contemplated in the Bradley-Heinz cost sharing bill currently pending before the U.S. Senate, under the provisions of the Thornburgh Plan.

The Public Advocate, through its witness, did not provide a specific recommendation for decontamination or clean-up costs. The record indicates the Public Advocate continues to argue that Petitioner cannot pass on to customers any TMI accident-related costs, including decontamination costs, without a resolution by the Board as to whether negligence or mismanagement contributed to the accident at TMI-2. The Public Advocate's witness, however, did testify that the dollar allowance for decontamination costs would be added to his revenue recommendation in Phase II, should the Board allow some level of cost to be recovered.

The Staff position, while approving and supportive of the sharing concept, would not have provided for recovery of this cost until all other participants under the plan pledged their shares. The Board, however, finds that, as difficult as it is to impose additional costs on these already burdened ratepayers we can no longer ask others to share what we are unwilling to undertake.

Since the accident in March, 1979, the Board has advocated a sharing philosophy regarding this event. It has attempted to ask both ratepayers and stockholders to assume part of the financial burden of the accident. Before now, however, we have *never* asked the ratepayers to participate, through rates, in the clean-up effort.

Each Commissioner has testified in Washington before Congressional Committees as to our belief that the costs of the clean-

up must be shared. We have embraced Governor Thornburgh's sharing plan under which the Federal government, the residents of both Pennsylvania and New Jersey, the nuclear industry and the ratepayers of Jersey Central Power & Light, Metropolitan Edison and Pennsylvania Electric would all contribute a share to the clean-up effort. Substantial federal funds have already been pledged.

The budget of the State of Pennsylvania includes a line item for its share of clean-up costs. The potential for additional funding exists.

However, there is a clear requirement in Washington that to ask ratepayers in other states to share part of the clean-up effort while the New Jersey ratepayers refuse to contribute is not only unfair but unwise. Our continued refusal clearly jeopardizes hundreds of millions of dollars in contributions which would serve to tremendously reduce the burden to Jersey Central Power and Light ratepayers in the long-run. To fail to participate may well mean the Thornburgh Plan will never be implemented and we will have lost this opportunity to spread the costs over a broad base of interested parties.

We recognize and appreciate the support of Governor Thomas H. Kean in his full endorsement of the Thornburgh Plan. The Public Advocate Joseph Rodriguez has also publically supported the sharing concept of the Thornburgh Plan and its ramifications. We are cognizant of the impact of that support.

We note that the average residential customer's bill will increase \$6.00 a year with this allowance for clean up, or \$.50 per month. However the real cost will be even less. From testimony before both State and Federal governmental officials, it is clear that they perceive the funding of TMI-II as a major impediment to the recovery of this utility. If the investment community feels that the risk of JCP&L is reduced, the cost of borrowing by the company and the ultimate cost to the ratepayer will be reduced.

We shall direct that the Petitioner set up an escrow account for the funds collected for decontamination, this account will be administered by the Board, the administrative details of which

shall be decided by the Board. Any other funds, from whatever external sources which may hereafter be made available to the utility for decontamination, shall also be placed in the account. This will ensure that funds collected for decontamination will be used exclusively for that purpose.

#### 4. NUCLEAR INDUSTRY CONTRIBUTIONS

The Board notes in further consideration of the sharing concept however, that in our opinion, the nuclear industry as a whole has not been as supportive as we would have hoped. Therefore, at the September Edison Electric Institute meeting, we shall request that the industry voluntarily contribute to the sharing plan. It is our intention to discuss with New Jersey utilities the necessity for such an endeavor on the part of the industry. Failing a positive response, in the future New Jersey utilities will no longer be permitted to pass through the cost of their membership dues in EEI or EPRI assessment to their ratepayers. These dues are used in part for research and development.

In the opinion of the Board, the TMI situation provides an area of research which is unparalleled in technological and economic impact.

#### 5. CESSATION OF DEPRECIATION ON TMI-I

As part of Docket No. 818-736, Petitioner, the Public Advocate and Staff have agreed as part of the stipulation in Stage I on the treatment of cessation of depreciation on the TMI plants. After review, we adopt this position.

#### 6. OLD DEFERRED ENERGY

The Advocate recommended that \$18,162,000 of old deferred energy expense be removed from Petitioner's operating expenses and the balance transferred to the currently pending LEAC proceeding, Docket No. 821-75. Staff and the Petitioner agree with this recommendation.

Therefore, the Board directs Petitioner to include the balance in that account in its calculation of the pending LEAC, Docket No. 821-75, decision on which can be anticipated by September 1, 1982.

#### 7. OYSTER CREEK REPAIRS

During the pendency of this matter, it became apparent that extensive repairs would have to be undertaken on the Oyster Creek nuclear plant during its next two scheduled refueling outages. The extent of those repairs is of such concern to the Board, that we will direct the Petitioner to inform us before undertaking any repairs of their nature and anticipated cost. An overview reporting system will be set up by the Division of Electric and Petitioner to insure timely reporting of the ongoing status of these repairs.

#### 8. TARIFF DESIGN

The tariff design stipulation (Att. 1) signed by the parties on March 5, 1982 is a reasonable resolution of the issues. First, it sets equitable standards for the allocation of revenue increases to each customer class. Second, it continues the further cost definition in the design of individual tariffs. This includes a further flattening of the General Service Secondary tariff, demand-energy charge allocation for General Service Primary and Transmission tariffs, and an increased inversion of the summer residential tariff. The latter is a step in setting a price signal to the high summer user which reflects the increased cost of on-peak service.

Finally, this stipulation includes additional loan management initiatives. Mandatory time-of-day rates for newly constructed electric heat or hot water residences and the capacity offset mechanism to encourage storage water heating are both significant efforts to manage load to off-peak and thus avoid the cost of additional capacity.

The Board will adopt this stipulated tariff design submitted by the parties.

## V. SUMMARY

Based upon the full record in this proceeding, Stages I, II, and III, a review of the ALJ's Report and Recommendation and the exceptions filed by the parties, the Board *HEREBY FINDS*:

1. The fair value rate base for the purposes of this proceeding excluding the TMI units is \$1,324,714,000.
2. The fair rate of return applicable to the rate base found herein is 11.32%
3. A rate of return of 11.32% applied to a rate base of \$1,324,714,000 allows operating income of \$149,958,000 or an increase of \$68,822,000 in annual operating revenues.
4. The Petitioner may recover, through rates, an additional \$13,854,000 per year for five years to be placed in an escrow account for the clean-up at TMI-II pursuant to the rationale of the Bradley Heinz "Thornburgh" cost sharing plan.
5. The Tariff Design Stipulation, submitted March 5, 1982 and entered into by the active parties, is reasonable and in the public interest.
6. TMI-I shall not be returned to the Petitioner's rate base until such time as it resumes commercial operation and the Board has reviewed its status.

Therefore, based upon the foregoing, the Board *HEREBY AUTHORIZES* an increase in rates as specified in this Decision and Order and *HEREBY ACCEPTS* the tariffs submitted in accordance with the rate design herein.

The Board *HEREBY DIRECTS* that the fuel costs of the existing LEAC be rolled into base rates in the amount of 5.676 mills per kwh.

DATED: July 22, 1982  
(SEAL)

BOARD OF PUBLIC UTILITIES  
BY: (SIGNED)

BARBARA A. CURRAN  
PRESIDENT

GEORGE H. BARBOUR  
COMMISSIONER

ATTESTED:  
(SIGNED)

EDWARD H. HYNES  
COMMISSIONER

TERESA M. SELLMAYER  
ACTING SECRETARY

## JERSEY CENTRAL POWER AND LIGHT COMPANY

## Revenue Requirement Summary

(000's)

	Stage II (Attrition)	Thornburgh Plan TMI-II Clean-Up	Total
Rate Base .....	\$1,324,714	—	\$1,324,714
Rate of Return .....	11.32%	—	11.32%
Income Requirement	\$ 149,958	—	\$ 149,958
Pro-Forma Income ...	\$ 117,165	—	\$ 110,564
Income Deficiency ....	\$ 32,793	\$ 6,601	\$ 39,394
Revenue Factor .....	2.0987	2.0987	2.0987
Revenue Require- ment .....	\$ 68,822	\$13,854	\$ 82,676

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**Appendix D**

**DECISION ON MOTION**

STATE OF NEW JERSEY  
DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES  
1100 Raymond Blvd.  
Newark, New Jersey 07102

BPU DOCKET NOS. 795-427  
BPU DOCKET NOS. 804-285  
BPU DOCKET NOS. 811-25

IN THE MATTER OF THE PETITIONS OF JERSEY CENTRAL  
POWER & LIGHT COMPANY FOR INCREASES IN ITS  
LEVELIZED ENERGY ADJUSTMENT CHARGE AND ITS BASE  
RATES.

(Appearance List Attached)

**BY THE BOARD:**

The Public Advocate by Motion of March 2, 1981 joined the County of Ocean in moving before the Board for the following relief: (1) That the Board undertake a formal proceeding to determine the culpability or "fault" that can be attributed to petitioner relating to the nuclear accident at Three Mile Island, Pennsylvania, which, to this date, has kept both TMI Units I and II out of service; (2) That the Board in effect, "freeze" petitioner's rates by deferring consideration of the current energy adjustment docket and base rate docket until completion of the requested "fault" proceeding.

The Advocate, in a series of moving papers, has urged that the Board is precluded as a matter of law from fashioning rate relief in the current energy adjustment proceeding and base rate proceeding even if otherwise justified, unless and until it makes a

finding as to the degree of culpability, if any, that should be attributed to petitioner, related to the TMI-2 accident.

The thrust of the movant's position is that the Board is legally required to determine the question of management prudence and, therefore, must initiate the requested proceeding. The argument runs that if the Board finds fault on the basis of the requested proceeding, the Board would then be required to attribute a substantial portion of the replacement purchase power costs already reflected in rates, and pending for Board consideration,<sup>1</sup> to the utility itself, with a consequent reduction in ratepayer costs.

The Advocate has also moved for denial of the proposed base rate increase in toto, on the grounds that it includes in rate base, TMI-1 capital costs, contrary to the Board's Order of April 1, 1980 in Docket No. 795-427, which removed these capital costs from rate base. This portion of the Advocate motion is *DENIED*, since the Board will evaluate this issue, as well as other substantive issues, in the context of its final determination in the base rate docket.

The board has concluded, for the legal and policy reasons set forth below, that it would be counterproductive to the public interest, procedurally unmanageable and undermine those positive efforts under way to share the cost burdens of the TMI accident, to grant these motions. These motions are consequently *DENIED* in full, based upon our current evaluation.

We will set forth our reasons which led us to conclude that these motions should be denied.

First, the benefit to the customer of receiving reliable electric service requires a utility healthy enough to provide that service. Embarking on a fault investigation of a nuclear accident, a most complex endeavor at best, and freezing currently pending rate cases until such a proposed investigation is completed, is not in the public interest. Such a course could be of no real benefit to

<sup>1</sup> Pending before the Board in Docket No. 811-25 are proposed increases in the Levelized Energy Adjustment Clause; and in Docket Nos. 795-427 and 804-285, the base rate case will shortly be referred to the Board for determination by the Office of Administrative Law. We are dealing here with interlocutory motions filed in both dockets.

the ratepayer, since reasonable replacement power costs must be paid for if ongoing service is to continue. We have outlined below those initiatives that can be of help to the hard-pressed customer, such as returning TMI-I to service, the success of pending law suits, the benefits of which will flow through to the ratepayer, and federal initiatives to share the burdens of the TMI accident.

Balancing the interest of customers in refunds anticipated from a penalty action against the need for an ongoing utility to provide ongoing service, leads us to deny these motions.

The Supreme Court on April 8, 1981 has held action similar to that we take today to be reasonable and proper and as well within the bounds of Board discretion.<sup>1</sup> The Supreme Court held in this matter that removal of TMI-I from rate base, coupled with the accelerated amortization of JCP&L's deferred energy balance, was a reasonable resolution of a unique policy question, well within the Board's discretion, which properly balanced the level of rates placed upon JCP&L rate payers against the need to maintain the utility to provide safe, adequate and proper service to the public.

We believe our action today, which is a continuation of our determination to carefully balance these interests, is also well within the Board's discretion. As the Court stated on Page 7, of its Opinion.

*In Public Service Coordinated Transport v. State*, 5 N.J. 196 (1950) this Court observed that "rate making is a legislative and not a judicial function, and that the Board of Public Utility Commissioners, to which the Legislature has delegated its rate-making power is vested with broad discretion in the exercise of that authority". *Id.* at 214. Thus, the Board's rulings are entitled to presumptive validity and will not be disturbed unless we find a lack of "reasonable support in the evidence." *In re New Jersey Power & Light Co.*, 9 N.J. 498, 609 (1952).

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<sup>1</sup> *In the Matter of the Petition of Jersey Central Power & Light for the Amendment to Energy Adjustment Clause*, N.J. (April 8, 1981)

What has been placed at issue here is the appropriateness of permitting the recovery of replacement purchase power costs for TMI-I after we have removed the capital costs of TMI-I from rate base. This was the very issue before the Supreme Court, *supra*, in which it affirmed the Board's discretionary powers to act.

In *Daaleman v. The Elizabethtown Gas Company*, 77 N.J. 267 (1978), the New Jersey Supreme Court stated at page 569:

Punitive assessments against it are counterproductive because, in the long run, it is the public users of the utility service on whom the punitive award will fall. No matter how such award is molded to avoid a "pass through" of the punitive damages, the financial structure of the utility will be affected with resultant loss of investor appeal and higher interest rates for borrowing, all of which will ultimately be reflected in the rates charged consumers.

Under present circumstances, we conclude that the proposed "penalty" investigation of this utility is not in the public interest.

Second, the Board has not ignored the rate consequences to the customer flowing from the TMI accident. After notice and hearings, we removed TMI-II from rate base on June 18, 1979, Docket 795-427. Furthermore, on April 1, 1980, we removed TMI-I from rate base on the basis of a "used and useful" approach. We held in this Docket No. 795-427, Phase II, that this facility, though unaffected by the accident, could not continue to earn a rate of return with a consequent cost to the rate payer, since there was not any reasonable expectation that it would return to service in a reasonably foreseeable period of time. We pointed out that it would be inequitable for the customer to bear the capital cost of TMI-I, as well as the replacement energy costs associated with the unit being out of service. We further prohibited the payment of dividends from JCP&L to the parent corporation GPU.

Third, this ruling is consistent with the position taken by the Pennsylvania Public Utility Commission, which has direct jurisdiction over the site of the accident as well as over the utility, Metropolitan Edison, which was in operational control of these

facilities. In Docket I-79040308 the Commission by Order of February 8, 1980, clarified a previous Order, in which the Commission determined it would not initiate an independent "fault" proceeding regarding the TMI accident. The Commission stated at page 3:

Our order was no more than a statement that we do not intend to reach an independent conclusion with respect to the design, construction and operation of the plant, at a time when those matters are under active consideration by the agency charged with direct authority over them. We may, however, wish to consider the conclusion of that agency at a later time. We will not voluntarily embark on this record on an exploration of very technical matters beyond the normal expertise of this agency in the hope that some sort of conclusion might be drawn as to the management capability and prudence of Respondents.

Furthermore, in the same docket by Order of May 9, 1980, the Commission concluded as follows with respect to the "fault" question, at Page 25:

If the courts and/or the NRC should ultimately conclude that Met Ed was imprudent or negligent in its operation or management of Three Mile Island, then this Commission will take notice of such determinations and their relevance to any portion of the replacement power costs for which current recovery is permitted today.

Any subsequent examination of these issues would have to be made with the public's interest in the continued provision of adequate, reliable electric service clearly in mind. This Commission recognizes the close relationship between that public interest and Met Ed's financial viability, and, if necessary, would balance the public's interest in adequate, reliable service against its interest in refunds.

In short, the reasoning of the Pennsylvania Commission closely parallels that of the New Jersey Supreme Court affirming this Board in its decision on April 8, 1981, *supra*.

Fourth, the Board concludes that the design construction and operation, as well as the development, use and control of nuclear

facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. The Pennsylvania Commission stated flatly in its Order dated January 10, 1980, *supra*: "The design construction and operation of the nuclear reactor at TMI-II are under the exclusive jurisdiction of the Nuclear Regulatory Commission". We prefer to conclude that the Federal Atomic Energy Act, 42 U.S.C.A. 2011 *et seq.*, vests exclusive jurisdiction in the NRC only over activities reasonably related to the protection against radiation hazards; 42 U.S.C.A. 2021 (k). But certainly the Atomic Energy Act vest at least primary jurisdiction in the NRC by a pervasive regulatory scheme controlling the development of nuclear energy through the promulgation of detailed regulations.<sup>1</sup> Certainly this Board should defer to the expertise of the Federal Body, according to the concept of primary jurisdiction<sup>2</sup> in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion.

Fifth, there has been engrafted into the statutory framework requiring the Board to fix just and reasonable rates, *N.J.S.A.* 48:2-21, the "Hope Standards"<sup>3</sup> which require this Board to fix a level of rates that will provide for the financial integrity of the utility, provide it with the ability to finance needed construction, the opportunity to earn a reasonable rate of return and, most important, the ability to continue to render safe, adequate and proper service, *N.J.S.A.* 48:2-23. This utility system has not paid a dividend in two years. It has not, and cannot access financial markets to cover capital costs. It is paying expenses from a revolving line of short-term bank credit. This sole source of capital is based upon the bank's continuing evaluation of the utility's system revenue flow, which the movant seeks to restrict. If we were to stay even consideration of an appropriate level of purchase power costs and base rates in matters currently pending,

1 *State v. Jersey Central Power & Light*, 69 N.J. 102, (1976) at p. 112, *Northern States Power Company v. The State of Minn.*, 447 F.2d 1143 (8th Cir., 1971), at p. 1152.

2 *Woodside Homes v. Morristown*, 26 N.J. 529 (1958) at p. 541.

3 *Federal Power Comm. v. Hope Natural Gas*, 320 U.S. 591 (1943) at p. 603.

this could easily be interpreted by the banks as an "adverse change" permitting the banks to restrict their line of credit. Such a consequence would go to the very heart of the financial viability of this utility and its ability to serve its customers. We do not believe that the Supreme Court's holdings in the leading cases,<sup>1</sup> requires us to do otherwise. We recognize that adjustment clauses are provisional in nature pursuant to *N.J.S.A. 48:2-21.1* and must, by a reasonable umbilical cord, be supported by ultimate statutory findings based in *N.J.S.A. 48:2-21*.

These are the basic relevant factors—financial viability, just and reasonable rates, safe, adequate and proper service—which the Supreme Court directed on April 8, 1981, *supra*, that we reasonably weigh in reaching our determination.

How can this Board meet its primary statutory obligation to see that safe, adequate and proper service is provided by a viable entity if it embarks upon the road proposed by the movants? The proposed procedure could either result in a morass of conflicting claims or some attribution of management imprudence to JCP&L, which, if effectuated in penalties, would jeopardize vital electric service.

Sixth, we have considered the procedural complexities of the proposed investigation of fault in ruling on this motion. Suffice it to say that we have an out-of-state accident, an overlay of primary federal authority, split ownership of the TMI facilities and management control of the facilities by a Pennsylvania utility. We also have the results of two major fault inquiries, which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results.

The Kemeny Commission Report of October, 1979 utilizing the resources of a staff of over 200 experts and the Rogovin Report of January, 1980, utilizing a staff of 100 nuclear engineers

<sup>1</sup> *In Re Public Service Coordinated Transport*, 5 N.J. 196 (1950); *In Re Industrial Sand Rates*, 66 N.J. 12 (1974); *In Re Board's Investigation of Tele. Cos.*, 66 N.J. 476 (1975); *In Re Redi-Flo Corp.*, 76 N.J. 21 (1978).

and scientists, attributed the accident to a complex of intertwining factors including inadequately designed equipment, inadequate training of personnel, inadequate emergency room procedures, inadequate control room design and a system of divided responsibilities between the manufacturer, the Pennsylvania operator, the Nuclear Regulatory Commission, and the New York holding company.<sup>1</sup> We do not see much point in attempting to duplicate these efforts. Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-I returns to service. After what we envision to be a protracted and complex proceeding we would still have to balance the customers interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

Seventh, initiating a fault investigation would be counterproductive to two pending law suits where the negligence question will be tried in a proper forum. General Public Utilities commenced action on March 25, 1980 against Babcox and Wilcox in U.S. District Court, Southern District of New York alleging various grounds of negligence, such as defects in design and improper control procedures. Consistent with appropriate regulatory policy, we believe that benefits flowing to the utility system from this law suit will be properly allocated to benefit the New Jersey rate payer. Likewise, the utility system filed suit on December 8, 1980 against the Nuclear Regulatory Commission under the Federal Tort Claims Act alleging negligent acts and omissions by the Staff of the NRC. Consistent with regulatory policy, recoveries from this law suit will be allocated to the benefit of the New Jersey rate payer. The inappropriateness of using this Board as a duplicate forum to try the negligence of the parties is evident.

We note that the suit against the NRC refers to a nuclear accident in September, 1977, at the Davis-Besse nuclear plant of Toledo-Edison. The suit alleges that if the nuclear industry at

<sup>1</sup> Excerpts from the Kemeny Report are found in the Memorandum of the Public Advocate in Docket No. 795-427, dated February 19, 1980, Appendix A.

large, including the TMI operator, had been properly advised of corrective action to be taken as result of that accident, the TMI-II accident of March 28, 1979, could have been avoided. It is evident that question of fault is not a simplistic one and will be properly before the Federal Courts.

Eighth, on March 14, 1980, a consultant, Arthur Young, was retained to study all strategic options to provide continuing reliable service to the utility customers. The first portion of the study, dealing with bankruptcy options, which has been made available to the Advocate, concludes that bankruptcy would substantially add to rather than diminish rate payer costs as well as bring adequate service into question. The second portion of the study, which evaluates all other options, has just been received from the consultants. The Board will therefore be looking at every conceivable positive step that can be taken which would provide reasonable service at the most reasonable rate. Another fault investigation is not such a positive step.

If there is an attribution of fault to the utility on a federal level, the Board will evaluate the implications and consider such conclusions within the context of our evaluation of strategic options.

Next, there are many initiatives<sup>1</sup> at the federal level being sponsored through the New Jersey and Pennsylvania congressional delegation to provide a mechanism for the sharing of the costs of the TMI nuclear accident. Basic to these initiatives is the commitment of the respective regulatory agencies that they will meet their obligations to keep the utility system viable. The various proposals to support the financial underpinning of this utility system will be stifled if there is an expectation that any financial aid will be dissipated because the utility will "go under" during the process.

Next, the Advocate has argued that we have expressed our intention to proceed with a fault investigation. We note that on

1. For example, H.R. 1814 introduced by Congressman Hughes of New Jersey is before the House Interior and Insular Affairs Committee. The bill provides for amendment to the Atomic Energy Act of 1954 and the Price-Anderson Act of 1957 to provide extended insurance coverage for purchase power replacement costs related to the TMI outage.

January 23, 1980, in Docket No. 795-427, the Board directed the parties to file prehearing memoranda on the fault issue, fully exploring the legal and factual contentions as well as the implications of such an inquiry. The submissions filed in response thereto, as amended by the newly filed motions, have aided us in reaching a determination. However, the Board has the statutory responsibility for dealing on a continuing basis with the utilities under its jurisdiction, and it must meet those responsibilities in the light of contemporary and evolving circumstances, with recognition that its primary duty is to exert all reasonable efforts to see that essential utility is preserved for the citizens of this State.

Unquestionably this Board and its staff have been required to devote more time, effort and resources to the problems occasioned by Three Mile Island than has ever been true during the approximately 70 years since the agency was created. It is not an exaggeration to say that we probably have a more intimate knowledge of the regulatory and financial problems associated with this utility than any other matters subjected to our jurisdiction. This has not been a matter of choice. It has been a matter of sheer necessity.

The deteriorating financial health of the electric utility industry in general, has recently been the subject of a Joint Board Conference by the Federal Energy Regulatory Commission and invited state commissioners, including the President of the Board. The electric utility industry is faced with eroding cash flow, lower bond ratings and diminished real earnings which impact on their ability to continue to provide efficient and reliable service. Within this context, we recognize the potential negative impact which would be felt in the capital markets if a major electric utility would be pushed to the financial brink through state regulatory action.

The Board will require the utility to develop and submit a plan for Board review as to the allocation of potential recoveries and benefits to the ratepayer from the above-noted law suits.

**The Board will undertake a proceeding to intensively review and evaluate the strategic options now before us and provide interested parties with an opportunity to comment.**

**For the foregoing reasons, and based upon our current evaluation,**

**MOTIONS DENIED.**

**DATED: APRIL 23, 1981  
(SEAL)**

**BOARD OF PUBLIC UTILITIES  
BY: (SIGNED)**

**GEORGE H. BARBOUR  
PRESIDENT**

**EDWARD H. HYNES  
COMMISSIONER**

**BARBARA A. CURRAN  
COMMISSIONER**

**ATTEST:**

**GERALD A. CALABRESE,  
SECRETARY**

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**APPENDIX E**  
**IN THE**  
**SUPREME COURT OF NEW JERSEY**

**No. 21,691**

**JERSEY CENTRAL POWER & LIGHT COMPANY, APPELLANT,**

**v.**

**BOARD OF PUBLIC UTILITIES OF THE**  
**STATE OF NEW JERSEY, APPELLEE.**

**NOTICE OF APPEAL TO THE SUPREME COURT**  
**OF THE UNITED STATES**

Notice is hereby given that Jersey Central Power & Light Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, denying Appellant's petition for certification and dismissing Appellant's appeal, entered in this action on December 6, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of March, 1984, copies for the foregoing Notice of Appeal were mailed, by first class mail, postage prepaid, to the Board of Public Utilities, State of New Jersey, 1100 Raymond Boulevard, Newark, New Jersey 07102, Attention: Ms. Blossom Peretz, Secretary. I further certify that all parties required to be served have been served.

/s/ EDWARD DEHOPE  
EDWARD DEHOPE

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,  
*Appellant,*

*vs.*

BOARD OF PUBLIC UTILITIES OF THE STATE  
OF NEW JERSEY,  
*Appellee.*

On Appeal from the Superior Court of New Jersey,  
Appellate Division

---

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**MOTION OF APPELLEE BOARD OF PUBLIC UTILITIES  
OF THE STATE OF NEW JERSEY TO DISMISS  
OR AFFIRM**

---

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NO. 83-1478

IN THE

**Supreme Court of the United States**

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*Appellant,*

*vs.*

BOARD OF PUBLIC UTILITIES OF THE STATE  
OF NEW JERSEY,

*Appellee.*

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On Appeal from the Superior Court of New Jersey,  
Appellate Division

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**MOTION OF APPELLEE BOARD OF PUBLIC UTILITIES  
OF THE STATE OF NEW JERSEY TO DISMISS  
OR AFFIRM**

The Appellee Board of Public Utilities of the State of New Jersey respectfully moves pursuant to Rule 16.1(b) and (d) to dismiss this appeal or for summary affirmance of the judgment of the Superior Court of New Jersey, Appellate Division on the grounds that the decision below was manifestly correct and does not present substantial constitutional questions in need of further argument.

## Counter-Statement of the Case

The Appellant, Jersey Central Power & Light Company (Jersey Central), is a public utility of the State of New Jersey subject to the jurisdiction of the New Jersey Board of Public Utilities (Board) pursuant to N.J.S.A. 48:1-1 *et seq.* Jersey Central, a subsidiary of General Public Utilities Corporation (GPU), is owner of a 25% undivided interest in the Pennsylvania nuclear generating facility known as Three Mile Island (TMI).

On March 28, 1979 an accident at the TMI generating station, Unit No. 2 (TMI-2) rendered that unit inoperable. An undamaged companion unit, TMI Unit No. 1 (TMI-1), which was shutdown for refueling at the time of the accident, has been prevented from resuming generation by order of the Federal Nuclear Regulatory Commission (NRC) pending a complete review of such matters as unit design, operator qualifications, managerial competence and emergency procedures. Since the March 28, 1979 incident and the resultant loss of TMI generating capacity, Jersey Central has been before the Board in a succession proceedings seeking various forms of rate relief related to the TMI outage.

One of Jersey Central's earliest TMI-related filings was a May 4, 1979 petition seeking approval of an adjustment to its Levelized Energy Adjustment Clause (LEAC)\* reflecting costs associated with the emergency purchase of TMI replacement energy. On June 18, 1979, the Board permitted Jersey Central a \$74.5 million per year LEAC

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\*LEAC is a regulatory process used to adjust consumer rates as a result of fluctuations in fuel costs. A constant LEAC charge is based upon the utility's estimated prospective average 12 month energy costs. This charge is subject to earlier adjustment in the event overrecoveries or underrecoveries are experienced.

adjustment. In its Order granting this adjustment, the Board removed from Jersey Central's base rates capital and operating costs associated with the damaged and non-generating TMI-2 unit. The Board reasoned that inasmuch as such unit was not expected to return to service in the reasonably foreseeable future, the imposition of TMI-2 capital and operating costs upon ratepayers along with replacement energy costs would create an impermissible double burden upon customers served by Jersey Central. The capital and operating costs associated with the idle, but undamaged, TMI-1 unit were retained in Jersey Central's base rates, however, in the expectation that such unit would be capable of resuming generation by the end of 1979. Jersey Central did not appeal the Board's order removing TMI-2 from the company's base rates.

On April 1, 1980, when TMI-1 had still not returned to service the Board reconsidered the ratemaking status of that unit. Finding that prospects for the return of TMI-1 to service were more remote than had originally been anticipated, the Board removed the capital and operating costs associated with TMI-1 from Jersey Central's base rates. In order to avoid any adverse impact upon Jersey Central's cash flow, however, the Board simultaneously permitted an acceleration in Jersey Central's recovery of a deferred energy balance\* in an amount sufficient to offset the TMI-1 reduction in rates. As a result of the acceleration, no actual reduction in rates occurred. On April 11, 1980, Jersey Central appealed the removal of TMI-1 from its base rates to the Appellate Division of New Jersey's Superior Court (Appellate Division). The Supreme Court

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\* "Deferred energy balance" refers to those unrecovered energy costs accumulated due to short falls in prior fuel clause adjustments. Jersey Central had been previously authorized by the Board to amortize these costs over a 22 year period.

of New Jersey certified the appeal to itself prior to decision by the Appellate Division.

Jersey Central argued before the Supreme Court of New Jersey that the Board had erred in removing TMI-1 from rate base and had failed to properly take into consideration the impact of such removal on investor interests. On April 8, 1981, the Supreme Court of New Jersey unanimously affirmed the Board's removal of TMI-1 from Jersey Central's rate calculation, as well as the Board's simultaneous acceleration of the company's deferred energy account. *In re Jersey Central Power & Light Co. Petition*, 85 N.J. 520, 428 A.2d 498 (1981). In light of the uncertainty associated with the future availability of TMI generation, New Jersey's highest court held that the Board had properly found TMI-1 to be no longer used and useful in the public service and had, therefore, properly removed such unit from Jersey Central's rate calculation. The Court further noted that the TMI exclusion was necessary "in order to protect JCP & L's ratepayers from continuing to shoulder a double financial burden as to . . . substitute power for an indefinite period of time." 85 N.J. at 531, 428 A.2d at 503. The Court further approved the Board's acceleration of the deferred energy balance as an "innovative" and . . . mutually fair interim solution to a critical problem well within the broad jurisdiction vested in the Board . . ." 85 N.J. at 532, 428 A.2d at 504. Jersey Central did not petition this Court for review of such decision.

Jersey Central's instant application to this Court arises out of four TMI-related orders issued by the Board subsequent to the New Jersey Supreme Court's affirmance of the original TMI rate based exclusion. Two of the orders involved, one dated July 31, 1981 (JCA-70)\* and one

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\* "JCA" references are to the separate appendix submitted by Appellant Jersey Central with its Jurisdictional Statement.

dated July 22, 1982 (JCA-83), established new rates for Jersey Central and continued the TMI exclusion. In a consolidated proceeding before the Appellate Division, Jersey Central appealed both of these Board orders on the theory that *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), requires that the Board either return TMI to Jersey Central's rate base or, in the alternative, allow Jersey Central's investors a compensatory rate of return offsetting the continued TMI exclusion.

Also before the Appellate Division in the same consolidated proceeding were challenges by the New Jersey Public Advocate to Board orders permitting continued recovery from ratepayers of TMI replacement energy costs as well as a portion of TMI decontamination costs. One order, dated April 23, 1981, denied a motion by the Public Advocate seeking a moratorium on all future Jersey Central rate relief and a Board investigation into the extent to which Jersey Central may have been responsible for the accident at TMI (JCA-105). A second order, dated September 2, 1982, related to a further LEAC increase reflecting TMI replacement energy. Finally, the Public Advocate challenged a Board determination to pass on TMI decontamination costs to ratepayers without a prior Board inquiry into TMI culpability (JCA-98).

On July 28, 1983, the Appellate Division unanimously affirmed all of the challenged orders as proper exercises of the Board's discretionary ratemaking authority (JCA-3). On August 17, 1983 Jersey Central filed a Notice of Appeal and Notice of Petition for Certification with the Supreme Court of New Jersey. On December 6, 1983, the New Jersey Supreme Court dismissed the notice of appeal and denied the petition for certification. On March 5, 1984, Jersey Central filed its Notice of Appeal to the United States Supreme Court.

## ARGUMENT

The Appellate Division of the Superior Court of New Jersey properly upheld the exclusion of TMI from appellant's rate base as no longer "used and useful" in the public service and no substantial constitutional question having been presented, this Court should dismiss the appeal or summarily affirm the ruling below.

Despite Jersey Central's attempt to portray the decision below as being in substantial conflict with precedents of this Court and the Fifth and Fourteenth Amendments to the United States Constitution, the Appellate Division's decision is clearly in complete conformity with this Court's pronouncements in the area of public utility ratemaking. One of the most fundamental principles of utility regulation, first enunciated by this Court in *Smyth v. Ames*, 169 U.S. 466 (1898), is that a public utility is entitled to earn a reasonable return on the value of property it devotes to providing service to the public. Such property is commonly referred to as a utility's rate base and is described as property "used and useful" in the public service. It is well-settled that a rate based upon property not used and useful in providing service or on an excessive valuation of property in service, constitutes an extortionate charge. See *Denver Union Stock Yard Co. v. United States*, 304 U.S. 591 (1944); *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38, 56 (1936).

The "used and useful" principle of rate base determination has withstood all challenges and has remained a cornerstone of state and federal regulatory practice for over eighty years. In *Public Service Transport v. State*, 5 N.J. 196, 74 A.2d 580 (1950), one of New Jersey's landmark utility law cases, Chief Justice Arthur T. Vanderbilt described the rate base determination as "fundamental

in any rate proceeding" and defined rate base as "property of the public utility that is used and useful in the public service". 5 N.J. at 217, 74 A.2d at 591. See also, *Atlantic City Sewerage v. Board of Public Utility Commissioners*, 128 N.J.L. 359, 26 A.2d 71 (Sup. Ct. 1942); *In re New Jersey Power & Light Co.*, 9 N.J. 498, 89 A.2d 26 (1952); *State v. New Jersey Bell Telephone*, 30 N.J. 16, 29, 152 A.2d 35 (1959); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12, 327 A.2d 427 (1974). The Appellate Division decision challenged herein by Jersey Central does no more than uphold the Board's application of the "used and useful" principle to TMI. The record reviewed by the Appellate Division overwhelmingly demonstrated that both TMI-1 and TMI-2 would be out-of-service for an indefinite period of time and that ever-increasing replacement energy costs would have to be passed on to ratepayers. With specific reference to the undamaged TMI-1 unit, Jersey Central consistently failed to project with any degree of certainty when, if ever, such unit would resume operation. Given the unprecedented nature of the TMI outage, the inability to project a TMI return-to-service date, and the imposition of replacement energy costs upon ratepayers, the Board properly removed TMI from Jersey Central's rate base and the Appellate Division correctly affirmed that decision.

Although the Board recognized the necessity of removing TMI from rate base, it was not unmindful of the financial impact such action would have upon Jersey Central's investors. The Board carefully allocated TMI-related losses among ratepayers and investors. The removal of TMI-2 from rate base was done simultaneously with the passing on of replacement energy costs to ratepayers. The removal of TMI-1 was accompanied by a Board directive accelerating recovery of Jersey Central's deferred energy balance in an amount sufficient to offset any adverse im-

fact upon the company's cash flow. Moreover, when the Public Advocate, on behalf of Jersey Central's ratepayers, demanded a moratorium on all rate relief pending a Board inquiry into TMI culpability, the Board rejected such demands, citing the removal of TMI from rate base as adequate assurance that ratepayers would carry no more than their fair share of TMI-related costs. Similarly, over objections from the public, the Board permitted a pass-through of TMI-2 clean-up related costs to ratepayers in the hopes of hastening a TMI return-to-service (JCA-98).

In view of the above, Jersey Central's insistence upon full recognition of TMI in rate base or, in the alternative a compensatory rate-of-return offsetting the TMI exclusion, demonstrates beyond any doubt that Jersey Central does not want to balance consumer and investor interests but wishes to transfer all costs associated with the TMI accident to ratepayers. It is therefore ironic that in its attempt to transform what is simply a question of TMI's "used and useful" status into a substantial constitutional issue warranting review by this Court, Jersey Central invokes *Federal Power Com. v. Hope Natural Gas Co.*, *supra*. *Hope* endorses the very balancing process by which the Board has arrived at all of its TMI-related determinations. Contrary to Jersey Central's apparent belief, *Hope* does not require that ratepayer interests be subordinated to investor demands, but rather, that such competing interests be weighed in the ratemaking process. Three investor interests which should be considered by a regulator in arriving at a "just and reasonable" rate are identified in *Hope*. These investor interests are (1) that the company have sufficient revenue for operating and capital costs; (2) that the return on equity be commensurate with returns on similar enterprises, and (3) that the company be able to maintain credit and attract capital. 320 U.S. at 603. That these investor interests be fully satisfied,

however, is nowhere described as constitutionally mandated in either *Hope* or any subsequent decision by this Court. As the Appellate Division correctly pointed out in rejecting Jersey Central's "constitutional" arguments, the three *Hope* investor interests are not of constitutional dimension nor are they the only factors to be considered by the Board in arriving at a "just and reasonable" rate. All that *Hope* and its progeny require is that investor interests be appropriately balanced against the ratepayers' interest in non-exploitative rates. 320 U.S. at 603. The very use of the word "balance" in *Hope* indicates that neither investor nor ratepayer expectations will be fully met in arriving at a constitutionally "just and reasonable" rate.

Moreover, *Hope* does not require a utility regulator to guarantee a utility a profit nor permit an inflated rate of return to insulate the utility from hardships occasioned by the operation of economic forces. This should be clear from a reading of *Market Street Railway Co. v. Railroad Comm. of Cal.*, 324 U.S. 548 (1945), decided by this Court one year after the *Hope* decision. In *Market Street*, this Court stated:

... the due process clause has been applied to prevent government destruction of existing economic values. *It has not and cannot be used to insure values or to restore values that have been lost by the operation of economic forces.*

The owners of a property dedicated to the public service cannot be said to suffer injury if a rate is fixed ... which probably will produce a fair return on the present fair value of their property. *If it has lost all value except salvage, they suffer no loss if they earn a return on salvage value.* 324 U.S. at 567 [emphasis added].

It is "restoration" of lost TMI value that Jersey Central seeks to achieve by means of either a premature return of TMI to rate base or an inflated rate of return on the remainder of property it has dedicated to the public use. As this Court said in *Market Street*:

(T)he due process clause never has been held by this Court to require a commission to fix rates . . . on an investment after it has vanished . . . 324 U.S. 548.

Jersey Central's strained interpretation of *Hope* is further complicated by its belief that so long as the inclusion of TMI in rate base or, in the alternative the allowance of a compensatory rate of return, will result in rates no higher than those of neighboring utilities, such rates will not exploit customers. The test for exploitation, however, is not the meaningless comparison presented by Jersey Central, but rather, whether rates are based upon property "used and useful" in the public service. Both the Board and the Appellate Division, therefore properly rejected Jersey Central's arguments.

That investor concerns were in fact taken into consideration by the Board in reaching its rate base and rate-of-return determinations is obvious from even the most cursory review of the record below. In the Board's July 31, 1981 Order, for example, the Board specifically referred to the "extraordinary events associated with Three Mile Island and their financial impact on the Company" which "further complicates the measurement of an appropriate rate-of-return (JCA-76). The "regulatory problems and uncertainties" confronting Jersey Central were also noted by the Board, along with a recitation of recent Board efforts to minimize the risks associated with various federal regulatory actions (JCA-77). In rejecting as too

low the Public Advocate's recommended 13.5% to 14.34% return on equity, the Board emphasized the need to reflect in the rate-of-return "present and prospective risks" and "capital market realities". A return on equity of 15% was described by the Board as the "highest ever granted a New Jersey utility" and was found to be an adequate reflection of investor concerns (JCA-77, JCA-81).

Similarly, in the Board's July 22, 1982 rate order, Jersey Central's limited access to traditional money and capital markets was acknowledged, as was the need to deal with Jersey Central's financial problems in a consistent and realistic way. The Board rejected the Public Advocate's recommended return on equity of 14.84% to 15.69% as inadequate and awarded Jersey Central a 17% return on equity. Referring to a recent decision in which it had awarded another utility a 16% return on equity, the Board described its award of a 17% return on equity as reflective of the "unrebuttable higher risk" faced by Jersey Central (JCA-93 to JCA-95).

In summary, therefore, investor concerns were part of the Board's rate-of-return deliberations and, as required by *Hope*, were "balanced" against the ratepayer's interest in avoiding exploitative rates. Jersey Central may not be happy with the Board's "*Hope*" balance of investor and consumer interests, but its mere dissatisfaction with the exercise of the Board's expert ratemaking judgment and the Appellate Division's affirmance of that judgment does not give rise to a substantial constitutional question calling for review by this Court. It is well-settled that, in the absence of a clear conflict with some specific federal constitutional prohibition or federal law, courts will not substitute their social and economic judgments for those of the expert bodies to whom such matters have been entrusted. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). For such reasons, Jersey Central's appeal should be dismissed or, in the alternative, the decision below should be summarily affirmed.

## CONCLUSION

It is respectfully urged that for the foregoing reasons, the appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

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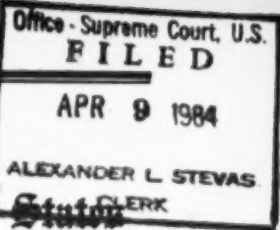
By: ANDREA M. SILKOWITZ\*  
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Deputy Attorney General

Dated: March 27, 1984

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\* Member of the Supreme Court Bar.



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*Appellant,*

*v.*

BOARD OF PUBLIC UTILITIES OF THE STATE  
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*Appellee.*

On Appeal from the Supreme Court of New Jersey

**MOTION OF APPELLEE, DEPARTMENT OF THE  
PUBLIC ADVOCATE DIVISION OF RATE COUNSEL  
TO DISMISS APPEAL, OR IN THE ALTERNATIVE,  
MOTION TO AFFIRM**

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On Appeal from the Supreme Court of New Jersey

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**MOTION OF APPELLEE, DEPARTMENT OF THE  
PUBLIC ADVOCATE DIVISION OF RATE COUNSEL  
TO DISMISS APPEAL, OR IN THE ALTERNATIVE,  
MOTION TO AFFIRM**

## Counter-Statement of Facts

The Board's decision should be affirmed particularly in recognition of the many positive steps taken by the Board to protect the investor interests in the face of the many problems which confronted Jersey Central Power & Light Company (hereinafter "JCP&L" or "Jersey Central"). The Appellate Division noted that "Because of the accident, JCP&L has been before the New Jersey Board of Public Utilities on an almost daily basis seeking various forms of relief" (JCA-6).<sup>\*</sup> The rates of JCP&L have increased substantially since the accident and at a much higher rate than would have been the case but for the accident. The Board has given ample consideration to JCP&L's investors' interests in its ratemaking determinations in the wake of the accident which occurred on March 28, 1979 at the Three Mile Island nuclear plant, Unit 2 (TMI-2). The damaged TMI-2 unit has remained inoperable since the accident and still must be decontaminated. The TMI-1 unit was shut down for refueling at the time of the accident and has remained shut down by order of the Nuclear Regulatory Commission (NRC).

Apart from the immediate potential health hazards associated with the TMI accident, the most pressing problem for the Board with regard to JCP&L was the economic one of providing the utility with the financial ability to operate its utility plant and to purchase replacement power to serve its customers.

In May of 1979 JCP&L filed with the Board in Docket No. 795-427 for a pass through of its replacement power costs to its ratepayers through its Levelized Energy

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<sup>\*</sup> "JCA" refers to JCP&L's Appendix; "JC" refers to JCP&L's Jurisdictional Statement. "A" refers to this Appellee's Appendix.

Adjustment Clause (LEAC\*). On June 18, 1979 the Board in that docket allowed JCP&L to pass through its replacement power costs resulting from the TMI accident (A-17). JCP&L was allowed a LEAC rate increase of \$74.5 million.

In that order the Board determined that because of the severe damage to the TMI-2 unit it was no longer used and useful in serving its ratepayers and that ratepayers should not have to pay a return on the utility's investment on that inoperable unit. Accordingly, the Board reduced JCP&L's base rates by \$29 million to reflect the exclusion of TMI-2 from rate base simultaneously with its allowing JCP&L a \$74.5 million LEAC increase to pay for replacement power. The Board thus balanced the interests of the shareholders with those of the ratepayers. JCP&L did not appeal to any court from the Board's order removing its investment in the TMI-2 unit from its rate base.

On April 1, 1980 in Docket No. 795-427 (A-1) the Board, because of the increasing uncertainty associated with the return to service of TMI-1, removed that unit from the utility's rate base so that ratepayers would no longer pay a return on the company's investment in that idle unit through base rates. However, the Board simultaneously accelerated the timing of the collection from ratepayers of the utility's unrecovered deferred energy balance\*\* in

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\* LEAC is a tariff which allows the utility to pass through increases in its fuel costs to ratepayers. Fuel costs are estimated for the next annual period and the LEAC rate is fixed to recoup those costs. There is a review after six months, and there is a reconciliation of overrecoveries or underrecoveries at the end of the LEAC period.

\*\* "Deferred energy balance" refers to those unrecovered energy costs due to shortfalls in collections from prior fuel clause adjustments. Prior to the acceleration provided for in the April 1, 1980 Order, the Board had ruled that JCP&L's collection of this balance from ratepayers would be allowed only over a 22 year period.

an amount sufficient to offset the revenue impact of excluding TMI-1 from rate base. The result of the Board's action was that there was no reduction in rates. Again the Board had acted to preserve JCP&L's cash flow position to pay for its current operating expenses, including replacement power. The Board also provided for an expedited procedure for returning the TMI-1 unit to rate base if it were restarted.

JCP&L appealed the removal of the TMI-1 unit from its rate base as an unconstitutional taking of its property. On April 8, 1981 the Supreme Court of New Jersey rejected the utility's appeal and affirmed the Board's order approving the balancing of the shareholders' interest with those of the ratepayers which had been accomplished by the Board. *In re Jersey Central Power & Light Co. Petition*, 85 N.J. 520, 428 A.2d 498 (1981). JCP&L did not appeal that decision to this Court.

On April 29, 1980 in Docket No. 804-285, JCP&L filed for an additional \$173.5 million in base rate revenues. In less than a month, on May 13, 1980, the Board granted JCP&L an emergency interim increase of \$60 million. On July 31, 1981 the Board granted JCP&L an additional \$110.7 million including the \$60 million of interim relief. The Board again reiterated the availability of an expedited procedure for including JCP&L's investment in TMI-1 in its rate base in the event that such unit were to be restarted.

In its 1981 rate order, the Board enumerated some of the positive steps which it had taken to improve the financial position of this utility as follows:

- (1) Approved the Revolving Credit Agreement under which the utility obtained short term financing;
- (2) Provided for the accelerated pass through of the utility's deferred energy costs to the ratepayers;
- (3) Intervened in federal administrative proceedings involving the pricing of energy sold to the utility;

(4) Supported the early NRC approval of a TMI-1 restart; and

(5) Endorsed the concept of a federal contribution toward the TMI-2 clean-up costs (JCA-12 to 13).

In that order of July 31, 1981 the Board allowed the company a return on equity of 16% with an overall rate of return of 10.68%. The Board believed that that rate, "the highest ever granted a New Jersey utility," adequately reflected the risks facing the company.

In its order dated July 31, 1981, the Board also found that JCP&L had abandoned its Forked River nuclear generating project on April 4, 1979. The Appellate Division's decision recognized that "the ratepayers had already paid over \$53 million in constructing the project in the form of construction work in progress included in rate base, from which ratepayers will never draw any benefit." (JCA-40) JCP&L had made an investment of over \$400 million in that abandoned project. Consistent with its normal practice the Board recognized the investors' interests by allowing the utility to recover its net abandonment loss from the Forked River plant\*—\$225 million—from the ratepayers over a 15 year period at a cost of approximately \$31.6 million per year to the ratepayers.

On August 11, 1981 JCP&L filed for a \$238.5 million increase in revenues which it later reduced to \$215 million. On July 22, 1982 the Board granted the company an \$82 million increase which permitted JCP&L to pass through to ratepayers \$13.8 million annually for 5 years for the decontamination of the TMI-2 unit. That order also allowed JCP&L a 17% return on equity.

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\* The investment made by JCP&L was reduced for certain adjustments and then reduced to reflect the income tax savings for the abandonment.

On September 2, 1982 the Board permitted another increase in JCP&L's Levelized Energy Adjustment Cause rate to pass through additional replacement power costs to ratepayers.

Through the Board's additional actions approving a subsequent Revolving Credit Agreement and two dividend payments to its parent, GPU, to service and fund debt which had been invested in JCP&L, JCP&L has continued to raise short term financing and has continued to pay for replacement energy to serve its customers while it remains in business after "the worst accident in the history of commercial nuclear power generation" in the United States. (Report of the President's Commission on the Accident at Three Mile Island, October 1979)

Thus, the Board in its various regulatory determinations for JCP&L in the wake of the TMI accident has given ample consideration to JCP&L's investors' interests. In the words of the Appellate Division:

It appears to us that JCP&L is seeking to ignore the difficult task which the Board has taken on in an attempt to keep that organization vital and still servicing the ratepayers. We believe that if it were not for the activities of this Board, JCP&L and its investors might well be nothing more than history. It does not serve the public well for the utility to take the attitude that it is entitled to everything when in fact it has gotten itself into a position where it must rely on the public to save it (JCA-35).

#### **Motion to Dismiss or in the Alternative Motion to Affirm**

Pursuant to Supreme Court Rule 16.1(b) and (d), Appellee, the Department of the Public Advocate, Division of Rate Counsel ("Public Advocate")\* hereby moves that

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\* The Department of the Public Advocate, Division of Rate Counsel, is a state agency which pursuant to N.J.S.A. 52:27E-1 *et seq.* represents the public interest in rate proceedings and appeals therefrom.

this Court dismiss this appeal of Jersey Central Power & Light Company because of an absence of a substantial federal question. In the alternative, the Public Advocate moves that this Court affirm the decision of the Supreme Court of New Jersey rendered below.

## **Introduction**

### **1. Overview.**

Jersey Central Power & Light Company purportedly is appealing from the judgment of the New Jersey Supreme Court denying certification and dismissing JCP&L's appeal regarding two decisions of the New Jersey Board of Public Utilities ("Board") which fixed rates for JCP&L. We propose to demonstrate in the course of this motion that (a) no substantial federal question is presented and (b) the Board's decisions were abundantly supported by generally accepted principles of public utility regulation and that ample consideration was afforded to utility investors' interests as is evidenced by the specifics of the Board's ratemaking determinations for JCP&L described in detail herein in the Counter-Statement of Facts and in Appellee's Argument in Support of its Motion to Affirm.

It will be demonstrated herein that there is an absence of a substantial federal question in that the assertion by appellant that the decision of the Board, affirmed by the New Jersey Superior Court, Appellate Division, and denied review by the New Jersey Supreme Court, patently involves no violation of the Fifth or Fourteenth Amendment of the United States Constitution—the federal constitutional grounds relied upon by JCP&L.

### **2. Jersey Central's "Questions Presented".**

Appellant JCP&L's Jurisdictional Statement states two "Questions Presented" which should be rejected as inac-

curate because of assumptions implicit in the questions which are not borne out by either the law or the facts. For example, we dispute the included assertion in Question 1 that the three investor-interest components discussed in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944) (*Hope*) were intended by the opinion in that case to constitute inviolate criteria as to whether electric utility rates are "just and reasonable" and that they were held therein to be of constitutional dimension.

Similarly, as to Appellant's Question 2, we dispute the assumption therein that the Board failed to assess the consequences of its rate determinations to customers and to investors.

Upon a reading of the Jurisdictional Statement as a whole, we conceive the issues of federal constitutional law actually here raised by Jersey Central to be as follows:

1. Whether *Hope* holds that a public utility's Fifth and/or Fourteenth Amendment due process property rights are necessarily denied by a decision of a state rate regulator which fails explicitly to address whether and fails to conclude that the rates determined will be sufficient not only "to recover operating expense and capital costs" but also "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" ("investor-interest factors").

2. Whether there is a violation of the Fifth and Fourteenth Amendment due process property rights of a public utility whose rates are determined by a state regulator if the regulator fails to make specific findings of fact as to whether the rates allowed will be sufficient to satisfy the "investor-interest" factors mentioned in Question 1 hereinabove.

This motion to dismiss the appeal is premised primarily on the view that the Jurisdictional Statement of JCP&L

fails to state a substantial federal question. The questions purported to be raised are (1) that the order of a state regulator, to meet substantive due process standards, must necessarily address each of the so-called investor-interest factors mentioned in the *Hope* opinion (320 U.S. at p. 603) and demonstrate the sufficiency of the rates allowed to satisfy each of those criteria, regardless of the contents of the rate decision in any other respect; and (2) that due process also requires that the findings of fact by the state regulator as to each of the determinations just stated be specific enough to enable a reviewing court to determine whether or not the three investor-interest criteria have been found satisfied by the rate decision.\*

We propose to demonstrate the patent absence of any federal constitutional support for either of the propositions thus asserted.

## **ARGUMENT IN SUPPORT OF MOTION TO DISMISS UNDER RULE 16.1(b) BECAUSE OF AN ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION**

### **I. *Hope* dealt with the requirements of the Natural Gas Act.**

The *Hope* opinion, and particularly page 603 thereof, relied upon by appellant, may be searched in vain for any allusion to the existence of a federal constitutional requirement with respect to the three investor interest criteria as controlling the rate making powers and duties of the Federal Power Commission acting under the then provisions of the Natural Gas Act (15 U.S.C. §717). On the other hand, the opinion is replete with allusions to the

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\* This is precisely what the Appellate Division characterized as the "utility's only constitutional argument . . ." (JCA-35).

statute under which the Federal Power Commission was exercising its rate-making powers in that case. 320 U.S. at 593, 600, 602, 603, 605, 607, 609, 611, etc. Indeed, the Court stated in *Hope*:

"Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former." *Id.* at 607.

In other words, conformance with the statute automatically guarantees constitutionality. In any event, any doubt as to whether *Hope* dealt only with the construction of the Natural Gas Act and not of the Constitution was laid to rest in an unanimous opinion of the Supreme Court the following year in *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548 (1945). In that case, the utility, in challenging a state regulatory commission's reduction of its charges on a constitutional basis, cited the identical investor-interest criteria of *Hope* relied upon by JCP&L. In rejecting the argument of the utility, the Court stated that the *Hope* case "was reviewed pursuant to statute rather than under the Fourteenth Amendment". *Id.* at 566.

It is thus clear that, apart from any other considerations, whatever was said in *Hope* concerning investor-interest criteria for rate fixing purposes did not involve a constitutional appraisal but merely an interpretation of the Natural Gas Act. It follows that JCP&L's thesis of a constitutional underpinning for the investor-interest factors is specious.

II. The *Hope* opinion, read as a whole, does not support the thesis that the investor-interest criteria mentioned therein are of constitutional dimension or that they require express articulation in a State rate case decision in order for it to survive constitutional scrutiny.

The *Hope* litigation essentially involved a dispute over the rate base used by the Federal Power Commission to determine "just and reasonable" rates or charges. The Court held that no precise formula for making that determination was imposed by Congress. As the Court said:

"And Congress has provided in §19(b) that on review of these rate orders in the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive'. Congress, however, has provided no formula by which the 'just and reasonable' rate is to be determined. It has not filled in the details of the general prescription of §4(a) and §5(a). It has not expressed in a specific rule the fixed principle of 'just and reasonable'". 320 U.S. at 600-601.

The Court went on to indicate that no judicial principle bound the Commission to the use of any particular formula. It said:

"We held in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, *supra*, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its ratemaking function, moreover, involves the making of 'pragmatic adjustments' . . . Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. [citations omitted]. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable judicial inquiry under the Act is at an end". 320 U.S. at 602.

In the light of the unequivocal abnegation by the Court in *Hope* of the imposition of any specific formula by which

the ratemaking body is required to articulate its determination of just and reasonable rates, JCP&L's effort to read into the *Hope* opinion a holding that the investor-interest factors discussed at page 603 of the opinion mandatorily require specific articulation in determination of gas rates under the Natural Gas Act—let alone constitute constitutional decisional prerequisites in a state electric utility case—is doomed to failure.

The inquiry then naturally arises, however, as to the significance of the discussion in the *Hope* opinion of the investor-interest factors if the Court did not intend their mandatory use for either gas rate determinations under the Natural Gas Act or as constitutional prerequisites in any rate case, state or federal. We suggest that the Court's purpose was to lay a basis for its demonstration that the Commission had, in fact, in the case under review, paid attention to the investor-interest factors under discussion. To the extent that the investor interest criteria were pertinent, the Federal Power Commission ("F.P.C.") refuted the company's position as to the insufficiency of the determination of rate base.

Close attention to the language of the Court in formulating the investor-interest factors, and to the discussion which follows in the opinion, supports our position. The Court states:

"But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. *From the investor or company point of view* it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. [citations omitted]. *By that standard* the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (Emphasis added). *Ibid.*

It should be carefully noted that the Court is not purporting to state the constitutional requirements of a rate base but merely what is important "from the investor or company point of view". *Ibid.* Immediately following the above quotation the Court clearly implies that "more or less" than the quoted objectives "might be allowed". *Ibid.* Even more directly, the Court indicates that it is not important to the case before it "to determine the various permissible ways in which any rate base on which the return is computed might be arrived at" *Ibid.* because the "end result" in the case could not "be condemned under the Act as unjust and unreasonable from the investor or company viewpoint". *Ibid.*

Thus, the Court's intent to state the investor-interest factors merely as a preface to a demonstration that those factors, whatever their significance, were satisfied in the case before it, is made clearly apparent. The recital of those factors has no other pertinence—and certainly no constitutional significance. Our reading of the allusions to the investor-interest criteria in the *Hope* case was precisely that of the Court itself the following year in *Market Street R. Co. v. Railroad Com. of Cal.*, *supra*, 324 U.S. at 566-567.

It follows *a fortiori* that the stated investor interest criteria need neither express articulation nor any incorporation in express findings of fact to enable a rate decision to pass constitutional scrutiny.

III. No other decision by the Supreme Court interprets *Hope* as requiring express consideration of the investor-interest criteria in a State rate determination as a Fourteenth Amendment due process prerequisite.

Appellant cites two subsequent decisions of this Court as purportedly confirming its interpretation of *Hope* to the effect indicated in its Jurisdictional Statement. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Federal Power Commission v. Memphis Light, Gas and Water*

*Division*, 411 U.S. 458 (1973). We submit that close examination of those decisions discloses no support for appellant's thesis. Neither case elevates the investor-interest criteria mentioned in *Hope* to constitutionally mandatory constituents of a formula universally applicable in utility rate decisions.

We have examined every Supreme Court opinion citing *Hope* and find none setting aside a rate order for failure of the rate-making body to justify its decision by reference to the investor-interest factors mentioned in *Hope*.

IV. Investor-interest factors may be downgraded in rate-making if the enterprise has suffered a loss in value or earning power from extrinsic circumstances.

The extent to which a rate-making body can properly require ratepayers to support the capital needs of a utility necessarily depends on the economic health of the enterprise. Where a utility falls into financial distress, not because of insufficiency of revenues *per se*, but because of unforeseen economic or other disastrous conditions, it cannot expect to be rescued by the imposition of artificial and inflated burdens upon its ratepayers. JCP&L suffered such abnormal economic vicissitudes in the breakdown of its TMI-2 nuclear facility in Pennsylvania, the accompanying denial of a certificate to operate the companion TMI-1 facility and in the abandonment of the uncompleted Forked River nuclear plant in New Jersey.

That *Hope* does not stand for Jersey Central's so-called "Hope Standards" can be seen by reading the entire paragraph in *Hope* from which they are culled:

The rate-making process under the act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus, we have stated in the Natural Gas Pipeline Company case that "regulation does not insure that the business shall produce net revenues." 315 U.S.

at 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. *From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.* These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. *The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at.* For we are of the view that the end result in this case cannot be condemned under the act as unjust and unreasonable from the investor or company viewpoint. (Some citations omitted). 320 U.S. at 603 (emphasis added)

Thus, *Hope* explicitly recognized that there may be conditions when "less might be allowed." Justice Douglas's language in *Hope* is strikingly similar to a passage from the concurring opinion of Justices Black, Douglas and Murphy in the earlier *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 606-8 (1942):

In view of [the] provisions [of the Natural Gas Act] we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base. The Commission has a broad area of discretion for selection of an appropriate rate base. The requirements of "just and reasonable" embrace among other factors two phases of the public interest: (1) the investor interest; (2) the consumer interest. The investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service. That cost has been defined by Mr. Justice

Brandeis as follows: "Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred; and enough more to attract capital." (citation omitted) . . .

One caveat however should be entered. *The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably a return to the company of the cost of the service might not be "just and reasonable" to the public . . .*

*This problem carries into a field not necessary to develop here. It re-emphasizes however that the investor interest is not the sole interest for protection. The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment though fair to investors would be grossly unfair to consumers . . . (emphasis added).*

Neither *Hope* nor *Natural Gas* involved a factual situation where a return to the company of the cost of service (including capital costs) would not be "just and reasonable" to the public; the investor and consumer interest did not collide. The collision speculated upon *did* occur and confront this Court one year after *Hope* in *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548 (1945).

*Market Street* was an appeal of an order reducing fares from seven to six cents. *Re Market Street R. Co.*, 54 P.U.R. (N.S.) 214 (1944). The Commission estimated that a six-cent fare would produce a reasonable return of approximately 6% on a rate base of \$7,950,000, whereas the existing seven-cent fare would yield an excessive 9.6% return on the same rate base. The rate base chosen represented the price at which the company had offered to sell its operations to the city, whereas the book value of the company's property was approximately \$38,000,000. The constitutional issue was clearly presented—the fare

reduction was calculated to decrease net income over that which would have been realized by maintaining the higher fare and thereby caused the return on book value to deteriorate even further. *Id.* The company appealed, making essentially the same allegations about the constitutional requirements imposed by *Hope* that Jersey Central made. In rejecting these contentions, the Court held that:

Without analyzing rate cases in detail, it may safely be generalized that the due process clause never has been held by this Court to require a commission to fix rates on . . . the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent government destruction of existing economic values. It has not and cannot be used to insure values or to restore values that have been lost by the operation of economic forces. 324 U.S. at 567.

Thus, to the extent that the capital needs of a utility are ordinarily appropriate for consideration in determining the sufficiency of the revenues allowed it in a rate proceeding, this case falls into the category with those cases "when less might be allowed." *Hope, supra*, 320 U.S. at 603.

#### V. The Board gave due consideration to investor interests.

Although we have demonstrated that articulation in express terms of investor-interest criteria in a rate determination is not constitutionally indispensable, we nevertheless point out that the Board was acutely conscious of JCP&L's potential financial problems and was influenced by them in the extent of the affirmative relief granted and in the denial of the Public Advocate's attempt to diminish relief on a basis of "fault" of the utility in relation

to the TMI accident. The details of affirmative relief are recounted in the Appellate Division opinion (JCA-12 to 13).

In rejecting an inquiry into fault prior to granting any rate relief the Board, to quote the Appellate Division,

"[a]lso expressed its concern for the impact the initiation of a fault inquiry might have upon an already wary banking community upon which JCP&L was exclusively dependent for credit, and also upon possible recovery by ratepayers in related civil litigation involving alleged negligence by Babcock and Wilcox, manufacturers of the TMI reactor." (JCA-18).

In fixing a rate of return on equity of 17% as against the Public Advocate's espousal of a rate of from 14.84 to 15.69%, the Board noted the yields of long term bonds; the fact that JCP&L had limited access to traditional money and capital markets (JCA-21); and also, that the 17% being allowed JCP&L on equity compared favorably with the recently allowed 16% for Public Service Electric and Gas Company which presented a lesser risk. *Ibid.*

The Board further adverted to JCP&L's financial problems when, in rejecting the fault issue raised by the Public Advocate, it held that the company must be financially able to continue providing service (JCA-25). The Board manifested its concern over the fact that the company had not paid a dividend in two years; that it had no access to capital markets to cover capital costs; and that it was paying expenses out of a short-term bank credit. (JCA-25 26). The Board stated that it would not do anything which "would go to the very heart of the financial viability of this utility and its ability to serve its customers". (JCA-26). The Board clearly provided adequate funds for the company to pay for all of its necessary operating and maintenance expenses including replacement power, its interest payments and dividends on preferred stock. Therefore, even though this company possessed a substantial

amount of useless assets, rates were substantially increased and funds were provided to permit the company to remain in business.

In dealing with the appropriate rate of return, the Board recognized that "[c]apital and credit markets reflect the consensus judgment of investors who divert resources to their highest marginal returns." (JCA-32).

The Appellate Division recounted the numerous actions which the Board had taken to assist Jersey Central to overcome the serious effect of the TMI disaster upon its operations. (JCA-12).

Thus, it is made manifest that in deciding the numerous issues and sub-issues presented in the various proceedings which appellant instituted before it, the Board was quite concerned with and gave such consideration as it deemed warranted to all of appellant's financial problems. Its refusal to grant all the relief appellant sought was arrived at only after careful consideration and balancing of the interests both of the utility's customers. The Board succeeded in providing revenues sufficient to maintain JCP&L's financial viability while not charging ratepayers for property which was not used and useful in the service of those customers.

#### **VI. The decision of the Board is not constitutionally deficient as to findings and conclusions.**

Appellant's second question presented in its Jurisdictional Statement, apparently going to the alleged absence of findings and conclusions by the Board, is obviously premised on acceptance of the validity of its initial contention that express determinations by the rate-making body as to the alleged investor-interest criteria are a constitutional prerequisite to a valid rate order. If there is no support for the latter proposition, as we believe we have demonstrated hereinabove, then it must follow that express findings of fact and conclusions of law in respect

of such criteria are not a constitutional prerequisite for a valid order.

Moreover, while it is a general principle that determinations of administrative agencies should be attended by adequate findings of fact and conclusions of law in order to enable proper judicial review of the determination, see *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 792, it has never been held that an administrative decision is unconstitutional because it is lacking in findings. The sole remedy therefore is a remand to the agency for proper findings, unless the reviewing court can find in the record sufficient evidence supportive of the determinations of the body under review to justify affirmance without remand. That is the case here. The decision of the Board in the present case is replete with findings expository of all the elements which the Board took into consideration in its proper balancing of the interests both of the consuming public and the utility involved.

Jersey Central's "assertions of a lack of rational explanation and policy discussion merely express its dissatisfaction with [the regulatory commission's] determination. The opinions . . . make plain that the record evidence was reviewed and the involved equities were weighed. No more is required." *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327, 1334 (D.C. Cir. 1981), *cert. den.* 457 U.S. 117 (1982).

## ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

### Introduction

As an alternative to the Motion to Dismiss, the Public Advocate also moves to affirm the New Jersey Supreme Court's decision refusing to overturn the Board of Public Utilities' decision. The Board's decision produced just and reasonable rates, balancing as it did the interests of investors and consumers, and should therefore be affirmed. In its various regulatory determinations in the wake of

the TMI accident, the Board gave ample consideration to JCP&L's investors' interests. The Counter-Statement of Facts submitted with this motion describes the positive steps that the Board took to assist in preserving the financial vitality of JCP&L in the aftermath of the accident. The Board's exclusions from rate base in the challenged decisions were justified and comport with relevant constitutional principles. See Point I *infra*. The rate of return awarded to JCP&L was generous, and JCP&L is certainly not constitutionally entitled to any higher return. See Point II *infra*. The Board correctly refused to adopt JCP&L's suggestion that rates should be awarded to the company based upon a comparison with prevailing electric rates elsewhere. See Point III *infra*.

The Appellate Division broke no new legal ground in its analysis of Jersey Central's contentions. The decision merely reaffirmed time-honored public utility law principles and applied them to the facts of the case and the BPU's decisions below.

#### **I. The Board used an appropriate rate base for JCP&L.**

The rate base determinations of the Board in the challenged cases were proper and indeed in compliance with any and all federal constitutional requirements when considered against the backdrop of the New Jersey case law regarding the property on which a utility is entitled to earn a return.

The New Jersey Supreme Court summed up much of current and traditional New Jersey law regarding rate base in the following paragraph from *In Re Jersey Central Power & Light Petition*, 85 N.J. 520, 423 A.2d 498 (1981):

A rate hearing involves (a) the determination of the value of utility property (rate base) . . . In determining what property goes into rate base this

Court has approved the 'used and useful' standard first articulated by our former Supreme Court in *Atlantic City & C. Co. v. Bd. of Pub. Utility Commrs.*, 128 N.J.L. 359, 365 (S. Ct. 1942), *aff'd. o.b.*, 129 N.J.L. 401 (E.&A. 1943). In *Public Service Coordinated Transport v. State*, Chief Justice Vanderbilt, after stating that the determination of rate base was fundamental in any rate proceeding, defined the rate base as 'the fair value of the property of the public utility that is used and useful in the public service.' 5 N.J. at 217. We have recently reaffirmed this concept in *In re Industrial Sand Rates*, 66 N.J. 12, 22 (1974). *Id* at 85 N.J. at 529.

Accordingly, an unbroken series of New Jersey decisions over a 40-year period (knowledge of which can therefore be fairly imputed to investors in New Jersey utilities) has approved a two-pronged test for inclusion in rate base, viz., (1) utility property which (2) is "used and useful." The earlier opinion cited by the court explained the rationale as follows, *Atlantic City Sewerage Co. v. Board of Pub. Utility Commrs.*, 128 N.J.L. 359, 366, 26 A.2d 71 (S.Ct. 1942), *aff'd. o.b.*, 129 N.J.L. 401 (E.&A. 1943):

A rate based upon an excessive valuation or upon *property not used or useful* in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied. [emphasis added]

As a result of the application of the "used and useful" standard, the rate base for Jersey Central does not include the investment in TMI-1, TMI-2 and Forked River. It then follows from the laws of arithmetic that setting rates so as to yield a particular numerical return on the rate base will automatically produce a lower return on the "book value" of the utility's investment in all cases, including Jersey Central's, where the utility chooses to include the investment in "nonearning assets" as part of its

"book value" on the same basis as the investment in assets which do earn a return.\*

This New Jersey law is entirely consistent with federal constitutional principles set forth in the Argument in Support of the Motion to Dismiss. Jersey Central's "Hope Standards" argument is bottomed on its erroneous assumption that *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) imposed a constitutionally-based requirement on public utility commissioners to specifically and explicitly consider the impact of their rate orders on the return which will be realized on the *book value* rather than on the *rate base*, a quantity which Jersey Central characterized as its "real earnings." The Appellate Division rejected this view: "JCP&L contends that the Board should have made a finding on what its real earnings would have been as a result of the Board's order. We do not read *Hope* to require that." (JCA-34).

Jersey Central maintained that it is constitutionally entitled to rates which will produce sufficient earnings

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\* The fact that regulators can, and often do, create or destroy "assets" or convert them from "earning assets" to "non-earning assets" by removing them from rate base has been officially recognized by the accounting profession. In December 1982 the Financial Accounting Standards Board issued "Statement of Financial Accounting Standards No. 71: Accounting for the Effects of Certain Types of Regulation" which requires separate accounting and disclosure for major "assets" not in rate base:

20. In some cases, a regulator may permit an enterprise to include a cost that would be charged to expense by an unregulated enterprise as an allowable cost over a period of time by amortizing that cost for rate-making purposes, but the regulator does not include the unrecovered amount in the rate base. That procedure does not provide a return on investment during the recovery period. If recovery of such major costs is provided without a return on investment during the recovery period, the enterprise shall disclose the remaining amounts of such assets and the remaining recovery period applicable to them.

on book value to enable it to pay what it considered adequate dividends and to attract capital on what it considered reasonable terms, irrespective of what return on rate base was implied by this level of rates. The only limitation which Jersey Central was willing to acknowledge is that the rates must not be so high as to "exploit" rate-payers. However, Jersey Central failed to cite any decisions which had applied an "exploitiveness" standard to any fact pattern or even given guidelines for such an application. Accordingly, Jersey Central decided to make up its own definition of the term and chose a criterion which involved comparing its rates with those charged by other electric utilities in New Jersey and in neighboring areas in other states (JC-8). Jersey Central alleges constitutional error in the fact that the New Jersey courts have failed to order the Board to apply this novel "comparative rate exploitation standard," and urges this Court to so order. No constitutional error was involved, as will be discussed below.

The Board has removed Jersey Central's investment in TMI-2, Forked River and TMI-1 from rate base. Each of these steps was justified and comports with the relevant constitutional principles.

#### (a) TMI-2.

TMI-2 falls squarely within the *Market Street* category of properties whose historical value no longer exists. 324 U.S. at 567. See discussion *supra* at 19 to 20. Indeed, its economic value is negative—whichever owns it has the obligation to spend over three quarters of a billion dollars merely to decontaminate it. It is only accounting legerdemain which, by keeping the financial impact of the cleanup obligation associated with ownership off the books of account, permits this "liability" to continue masquerading as an "asset."

**(b) Forked River.**

Construction on Forked River was suspended on April 4, 1979, never to resume. Jersey Central initially characterized the suspension as "temporary" but on April 1, 1980 changed the characterization to "indefinite."

The Appellate Division discussed the positions taken by the various parties and the Board's action regarding Forked River issues (JCA-11) and analyzed and rejected Jersey Central's objections thereto (JCA 38-40). In brief, Jersey Central itself proposed two rate-making approaches for treating the abandonment loss: (1) amortization over a 15 to 20 year period with a return on the unamortized balance (i.e., the unamortized balance would be in rate base) or (2) amortization over 10 years with no return on the unamortized balance. The Board adopted the position espoused by its Staff, which was a variant of Jersey Central's second alternative, *vis.*, amortization over 15 years without a return on the unamortized balance. The difference between the Board's treatment and Jersey Central's proposal, i.e., 15 year amortization rather than 10, is hardly of constitutional dimension.

Jersey Central also appealed the Board's refusal to permit it to include in its calculation of its abandonment loss an "allowance for funds used during construction" (AFUDC), i.e., the carrying charges on the company's investment accrued after construction was suspended on April 4, 1979. Jersey Central itself had ceased accruing AFUDC as of April 1, 1980, the date it unilaterally declared the suspension to be "indefinite," but claimed to be entitled to accrue AFUDC during the period when the suspension was "temporary." The Board agreed with the Public Advocate that the issue was very simple: When a project is suspended *de facto* and, without work ever resuming, is later unilaterally declared to be suspended *de jure*, is a utility entitled to collect AFUDC monies from ratepayers for the time period between the *de facto* and *de jure* suspension dates? To ask the question is to answer it.

## (c) TMI-1.

TMI-1 has been out of service for five years and faces an uncertain future. At this point in time, it is not clear when, or even whether, the Nuclear Regulatory Commission will permit the plant to reopen, at least under its present ownership and management. Its status can fairly be characterized as being in limbo. The Board's regulatory treatment of TMI-1 is and has been appropriate to the situation.

TMI-1 remained in rate base for a year after the TMI accident, but was removed from rate base as not being "used and useful" after a year had elapsed and its prospects for expeditious return to service had dimmed. The Board ordered the removal from rate base in order to protect Jersey Central's ratepayers from continuing to shoulder a double financial burden for the costs of the plant and for the power purchased to replace the idle plant's output. This action, and its underlying rationale for balancing the interests of ratepayers and of investors --ratepayers paying for replacement power and investors for the costs of the idle plant--was specifically approved by the New Jersey Supreme Court in *In re JCP&L Petition*, 85 N.J. 520, 530-31, 428 A.2d 498 (1981). The rationale remains compelling, and certainly the longer the unit remains out of service the more equitable the sharing formula seems. It should be noted that the Board has taken steps to mitigate the situation somewhat for the investors by allowing Jersey Central to cease accruing depreciation on the unit and in fact to reverse the accruals back to the time the unit was removed from rate base (JCA-86) and by committing itself to expeditiously re-examine TMI's rate base status when and if the unit returns to commercial operation (JCA-95 to 96).

## II. The Board used an appropriate rate of return.

Jersey Central argued in the Appellate Division that the Board should have increased the allowed rate of return to compensate for reducing the rate base. The Appellate Division properly rejected this as circular reasoning:

Once TMI-1 was taken out of the rate base, it would not have made sense to raise the rate of return because the utility was not entitled to a rate of return on property which was not part of the base. If the rate on the remaining property could be increased to make up for the loss of TMI-1, the effect would be the same as leaving TMI-1 in the rate base. Such would create a rate based upon property not part of the rate base and could produce an unreasonable rate of return. Accordingly, we conclude that the failure to increase the rate of return merely because TMI-1 was taken out of the rate base did not render the rate of return unjust or unreasonable (JCA-33).

It must be recognized that the rate base removals which took place were of abandoned projects and property which had been rendered no longer used and useful as a result of an accident. These are precisely the type of removals which investors could have, and presumably did anticipate—they have been compensated in the past through the allowed rate of return for assuming the risks of such removals. Had the Board increased the allowed return, the situation would have been analogous to the one described in *Washington Gas Light v. Baker*, 188 F.2d 11, 19-20 (D.C. Cir. 1950), *cert. den.* 340 U.S. 952 (1951):

[T]he investor would be paid for the occurrence of the very eventuality the risk of which he had been consciously carrying and for which he had already been paid. The effect upon the consumer would be the same as if an insured person were required to assume the loss against which he believed himself protected by payment of premiums. The result would clearly violate the consumer interest against "exorbitant" rates. (emphasis added)

In speaking of "risk," it is vital to distinguish, as did the *Baker* court, between the "premium" and the "loss" which actually occurs. The premium can be much smaller than the loss if whoever sets the amount of the premium thinks that a loss of that magnitude is extremely unlikely and discounts its occurrence heavily. For example, the rate of return which investors demand in order to invest in Pacific Gas & Electric ("PG&E") presumably, among other things, compensates investors for assuming the risk that the service territory, together with their investment, will be devastated by an earthquake. The fact that PG&E's rate of return is nevertheless comparable to that of other utilities in areas with no recorded earthquake history merely shows that the premium demanded is infinitesimal.

In the instant proceedings, every one of the Board's actions regarding rate base reflected only the application of settled law to recognized risks. Thus, investors have been compensated all along for assuming the risk that projects would be abandoned and that accidents would occur at nuclear power stations. The accident at TMI demonstrated that nuclear accidents were more likely to occur and could result in more extensive damage than many investors had assumed, but the accident risk is one which faces all nuclear utilities and which is presumably now reflected in allowed rates of return for these utilities. It does not present a risk which is peculiar to Jersey Central and for which it requires extra compensation as compared to, say, Public Service Electric & Gas Co. Another response by the nuclear and utility industries to the TMI accident was to increase property insurance and replacement power insurance coverages. The premiums for these types of insurance are now part of the rates so investors are protected by this explicit insurance mechanism as well as by the implicit protection in the allowed rate of return. There was absolutely no reason for the Board to allow a higher rate of return than the one which it allowed in order to compensate for the removal of property which was not used and useful.

**III. The Board properly recognized that Jersey Central's novel "comparative rate exploitation standard" was flawed.**

Jersey Central has continually maintained that the consumer interests are adequately protected as long as the rates are not so high as to "exploit" consumers. However, the company has failed to cite a single decision which actually applied an "exploitiveness" standard to a particular factual situation or even provided guidelines for such an application. Faced with this vacuum, Jersey Central chose to invent its own standard, which can be characterized as the "comparative rate" standard for "exploitation". The following is a typical formulation:

"... Jersey Central presented unchallenged evidence that, even if its requested rate increases were granted in full, Jersey Central's rates would be in line with those of customers of other utilities in New Jersey and neighboring areas. (See, e.g., Appendix, pages A-49 through A-52). Neither the orders of the Board nor the decision of the Appellate Division suggested that the rates sought by Jersey Central would "exploit" its customers." (JC-9)

There are serious flaws associated with the use of a "comparative rate" standard to measure consumer "exploitation" and the justness and reasonableness of rates.\* One of them was pointed out by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) in rejecting a contention that deriving area rates from prevailing contract prices would appropriately protect consumer interests and relates to the fact that the demand for utility services is relatively unresponsive to price increases:

The first issue is whether the Commission properly rejected the producers' contention that area rates

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\* Appellant fails to recognize that Jersey Central's rates have risen substantially since the TMI accident and far more substantially than they would have but for the accident.

should be derived from field, or contract, prices. The producers have urged that prevailing contract prices provide an accurate index of aggregate revenue requirements, and that they are an appropriate mechanism for the protection of consumer interests....

... [C]onsumers have been left without effective protection against steadily rising prices. Their alternative sources of energy are in practice few, and the demand for natural gas, particularly in California, is therefore relatively unresponsive to price increases. The consumer is thus obliged to rely upon the Commission to provide a complete, permanent and effective bond of protection from excessive rates and charges. (Citations omitted) (Footnotes omitted) (Emphasis added) 390 U.S. at 792-95.

Because of this insensitivity and the fact that each utility has an exclusive franchise area, merely comparing the rates charged by different utilities reveals nothing about the justness and reasonableness of any of them. Wide disparities in rate levels can, and do, exist side by side and persist over long periods of time (JCA-49 to -51). This is the reason why electric utilities are regulated in the first place; the consumer is obliged to rely on the regulators to "provide a complete, permanent and effective bond of protection from excessive rates and charges," *Id.*, which, left to their own devices, utilities could and would impose.

Jersey Central's approach raises more questions than it answers and would be unworkable. Would it introduce a "most favored nation" approach to ratemaking? Would granting an increase to the utility with the highest rates in the sample provide support for rate increases by other utilities? Could ratepayers in service territories where rates are high stand Jersey Central's argument on its head and contend that they are being exploited? Would a commission have to make findings in every rate case as to how the rates charged compared with those of other

utilities? And what would be the appropriate geographical area and time period for such a comparison? In short, there are serious methodological and procedural problems associated with the use of Jersey Central's novel standard. It should not be introduced into ratemaking.

## CONCLUSION

Appellant has failed to present in this appeal a substantial federal question and for this additional reason this Court should grant Appellee Rate Counsel's Motion to Dismiss this appeal. In addition, this Court should grant this Appellee's Motion to Dismiss or Affirm because in the decision appealed from the New Jersey Supreme Court properly refused to review an affirmance, by the New Jersey Appellate Division, of a decision of the Board of Public Utilities of the State of New Jersey which was just and reasonable and entirely consistent with federal and state constitutional principles.

Respectfully submitted,

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## APPENDIX A

Decision and Order of the Board of Public Utilities  
(April 1, 1980)

[SEAL]

STATE OF NEW JERSEY  
DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES  
1100 Raymond Boulevard  
Newark, New Jersey 07102

4/1/80  
LEGAL

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IN THE MATTER OF THE PETITION OF JERSEY  
CENTRAL POWER AND LIGHT COMPANY FOR AN  
APPROVAL OF AN AMENDMENT OF ITS TARIFF  
FOR ELECTRIC SERVICE AND FOR AMEND-  
MENT TO THE ENERGY ADJUSTMENT CLAUSE  
AND FACTOR IN SAID TARIFF FOR SUCH SER-  
VICE.

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DECISION AND ORDER  
DOCKET NO. 795-427  
(Phase II)

Kirsten, Friedman & Cherin, Esq. by Jack B. Kirsten,  
Esq., William F. Hyland, Esq. of Counsel and James

[1a]

*Appendix A*

B. Liberman, Esq., of Counsel 17 Academy Street, Newark, New Jersey for Jersey Central Power & Light Company

Leonard A. Peduto, Jr., Esq., Deputy Attorney General, Louis McAfoos, Esq., Regulatory Officer.

Alfred L. Nardelli, Esq., Raymond E. Makul, Esq., and Menasha Tausner, Esq., 10 Commerce Court, Newark, New Jersey for the Division of Rate Council.

Waters, McPherson, Hudzin & McNeill, Esqs., by David A. Waters, Esq., and Nicholas Filocco, Esq., 32 Journal Square, Jersey City, New Jersey, for the New Jersey Department of Energy.

Berry, Summerill, Piscal, Kagan & Privitera, Esqs., by Francis P. Piscal, Esq., and John C. Sahradek, Esq., Toms River, New Jersey 08753, for the County of Ocean.

Conway, Reisman, Bumgardner, Huley & Kleinfeld, Esq., by Nicholas W. Mattia, Jr., Esq., Newark, N.J. for the N.J. Utilities Association.

**BY THE BOARD:**

The Board in this proceeding has confronted a variety of regulatory issues related to the Three Mile Island accident of March 28, 1979. Of immediate concern in this phase of the proceeding is the determination as to whether or not TMI-1 continues to be used and useful as a rate base inclusion for the purpose of setting utility rates.

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On January 21, 1980, Jersey Central Power & Light Co. (petitioner) filed a petition for an increase of \$142 million in the company's LEAC (Docket No. 801-45). As a result of agreements among the parties, that petition was bifurcated into non-TMI energy replacement costs (\$105 million) and TMI energy replacement costs (\$37 million).

The Board on March 6, 1980 issued a Decision and Order in Docket No. 801-45 awarding the company \$84.2 million of non-TMI related energy costs. (The Decision and Order adopted Judge McGill's Initial Decision which was based on a stipulation among the parties).

In its Decision and Order of March 6, 1980, in Docket No. 801-45, the Board specifically directed Judge McGill to limit his investigation of the TMI-related replacement energy costs to just those costs and not to take evidence on the issue of whether TMI-1 was used and useful:

The issue of whether Three Mile Island-1 continues to be "used and useful" is reserved to the Board. The Board will commence investigation of this issue shortly. The Board will set oral argument on the issue of "used and useful" as it applies to TMI-1 to determine an appropriate scope for resolving this issue as well as the appropriate forum for such investigation.<sup>1</sup>

In its June 18, 1979 Decision and Order in this docket, the Board allowed TMI-1 to be continued in rate base even though TMI-1 was temporarily unavailable given

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<sup>1</sup> Decision and Order, Phase I, OAL Docket No. PUC 636-80, BPU Docket No. 801-45, *In the Matter of the Petition of JCP&L Company for an Increase in its Levelized Energy Adjustment Charge*, p.2.

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that it was likely to come back on line in the foreseeable future. However, the Board indicated that it would allow TMI-1 to be included in rate base until January 1, 1980. At that time, the Board would reexamine the status of TMI-1, and, if necessary, address the question of whether TMI-1 continued to be used and useful.

Public hearings were held on March 19, 21, 24 and 25, 1980, before President Barbour and Commissioner Hynes. Testimony was provided by witnesses for the petitioner and the Public Advocate. Position papers were filed with this Board by Petitioner, the Public Advocate, the Department of Energy, Ocean County, and the Board's Staff.

In its petition of January 21, 1980, JCP&L calculated TMI-related replacement energy costs on the premise that TMI-1 would continue to be unavailable, and, therefore, the company would consequently be asking ratepayers to pay for both the capital and operating expenses of TMI-1 and the replacement energy costs associated with that Unit. Clearly, the Board has the jurisdiction and responsibility to raise the question: should ratepayers be required to pay both the capital and operating expenses of TMI-1 and the replacement energy costs related to that Unit.

On March 24, 1980, Administrative Law Judge McGill conveyed to the Board his Initial Decision in Phase II of Docket No. 801-45. In that Initial Decision, he recommended that JCP&L be awarded \$34.2 million of the \$37 million request for TMI replacement energy costs. (It should be noted that the \$34.2 million recommendation was agreed to by all parties as reasonable.)\* Therefore, the

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\* See Direct Testimony of Public Advocate witness Knudsen, RCT-1, p.1.

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Board is compelled to address the issue of TMI-1's present status since the Unit has not returned to service and the company is attempting to continue recovering in base rates the effect of TMI-1 in rate base, while at the same time, recovering from ratepayers replacement energy costs associated with the Unit.

*"Used and Useful" Standard: TMI-2*

In its June 18, 1979, Decision and Order in this docket the Board determined that as a result of the severe damage to TMI-2, that unit was unlikely to return to service for a period of 2 to 4 years, if ever.<sup>8</sup> Given that finding, the Board concluded that TMI-2 was no longer used and useful for ratemaking purposes. The Board ordered that ratepayers should not be required to pay the capital and operating expenses associated with that unit. The Board determined that JCP&L be permitted to recover \$98.3 million in replacement energy costs over an 18-month period. On an annualized basis, the Board granted JCP&L an increase in LEAC revenues of \$74.7 million and reduced base rates by \$29 million related to the removal of TMI-2 from rate base. This authorized the utility to earn additional operating revenues of \$45.7 million. The basis for this action was that ratepayers should not be required to pay both the replacement energy costs related to TMI-2 and the capital and operating expenses associated with TMI-2 which was determined not to be used and useful

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<sup>8</sup> The Board is aware that GPU has commissioned studies relating to TMI-2. Of particular note is the study made by Bechtel Power Corporation which indicates on a preliminary basis that for planning purposes TMI-2 could be ready for restart in mid-1983 (under ideal regulatory conditions).

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for an extended period. This constituted, in the Board's opinion, an equitable sharing of the immediate costs of the accident (at least as measured by replacement energy costs).

*"Used and Useful" Standard: TMI-1*

TMI-1 did not return to service on January 1, 1980 as contemplated and continues to be unavailable for a variety of serious regulatory and technical reasons.<sup>4</sup> Absent action by this Board, the ratepayers of JCP&L would face the prospect of paying the replacement energy costs associated with TMI-1 and the capital and operating expenses associated with the unit. It is the Board's determination that petitioner's approach is inconsistent with the equitable sharing principle set forth earlier in regard to TMI-2.

Furthermore, petitioner's approach would violate a basic premise of public utility ratemaking, which prohibits a utility from earning a return on property which is not used and useful in rendering utility services for a considerable period of time.

The record in this proceeding clearly indicates that the uncertainty associated with the future availability of TMI-1 has increased. The ongoing proceedings before the NRC are comprehensive and incorporate complex considerations, some of which have never before been litigated. Further, questions have been raised by the NRC regarding the ability of Metropolitan Edison Company (Met-Ed), the operator of TMI to safely control the condition of TMI-2 while at the same time having the responsibility

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<sup>4</sup> See Direct Testimony of JCP&L witness R.C. Arnold (JC-1).

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of operating TMI-1. These questions relate both to the financial and technical ability of Met-Ed to safely operate the TMI facilities.<sup>\*</sup> In addition, it is not clear when all of the necessary modifications to TMI-1 will be completed and approved by the NRC. It is therefore apparent that TMI-1, out of service for the past year, will be out of service for at least a total of two years.

On the basis of the foregoing and a full review of the record, the Board is compelled to find that TMI-1 is not at the present time used and useful and should not be included in rate base. Therefore, ratepayers should not continue to bear the burden of the capital charges and operating expenses associated with that unit until such time as the unit is returned to service. *Public Service Coordinated Transport v. State of New Jersey*, 5 N.J. 196 (1950), *In re Intrastate Industrial Sand Rates*, 66 N.J. 12 (1974).

However, the Board recognizes that all reasonable replacement energy costs associated with TMI-1 should be paid by ratepayers. Therefore, the Board by its Order in the companion docket No. 801-45 has today granted JCP&L \$34.2 million of additional LEAC revenues. The removal of TMI-1 from rate base in this docket results in a base rate reduction of \$17.9 million annually. The reasoning that has been applied to TMI-1 and TMI-2 is consistent with sound regulatory policy and clearly effectuates the Board's sharing concept regarding the costs of the accident.

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<sup>\*</sup> See NRC Order CLI-80-5 (Docket No. 50-289) for a list of specific issues to be addressed by the Atomic Safety Licensing Board prior to TMI-1 restart.

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An argument raised by the utility should be addressed. The utility argues that the Board may only lawfully direct a decrease in Jersey Central's base rates after first determining that the present rates are in excess of the just and reasonable standard. The utility cautions that a determination regarding just and reasonable rates can only be made after the Board has evaluated, pursuant to N.J.S.A. 48:2-21, the reasonableness of the utility's overall rate of return in relationship to its rate base, income and expense profile.

Of course, today's Order does not result in a reduction of the company's rates. We consider the company's position to be a narrow interpretation of the Board's statutory authority, of the record of this case, and of the continuing procedural and substantive regulatory surveillance which the Board has placed upon this utility, its financial health and its ability to provide service.

The Board in exercising its jurisdiction has, frequently, granted on a provisional basis, rate relief pending a final Decision in a complete rate case and has granted an increase in operating revenues for LEAC's pending ultimate reconciliation in a future rate case. *In the Matter of Petition of the Atlantic City Electric Company*, (Docket No. 796-683) Decision and Order, September 19, 1979. In a companion case also decided today, a provisional LEAC increase is granted. Docket No. 801-45.

Aside from the fact that there is no actual reduction in base rates (due to a permitted acceleration of the Company's deferred energy expenses in an amount sufficient to maintain the rates at their existing level) the record is clear in showing that the nuclear unit in question has not, is not and will not, for a foreseeable period,

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be providing services to the customers of this utility. Although this facility may have been a prudent investment and may become useful in the future, it should not at present be included in rate base. Rate base should not be constructed on conjecture as to future conditions. We remove this facility from rate base due to present conditions and the future as far as can be ascertained. *In Re Red River Power* 12 PUR (N.S.) 355.

The question as to the utility's rate of return is one which the Board will consider on application by petitioner or, if necessary, on its own initiative. In such a petition, which we are advised is to be filed shortly, we will consider the just and reasonable aspects of the utility's existing rate structure vis a vis its rate base, operating income and expenses. The Board is properly authorized pursuant to N.J.S.A. 48:2-21 and 48:1-21.1 as interpreted in the Supreme Court's Decision and in *Revision of Rates of Redi-Flo Corporation*, 76 N.J. 21 (1978) and *In re Board's Investigation of Telephone Cos.*, 66 N.J. 476 (1975) both to raise and lower rates on a provisional basis after notice and hearing upon an adequate record—which is to be tied to appropriate rate base and rate of return findings in a "full blown" rate case. The umbilical cord will be tied between this and its companion case and appropriate final statutory findings on rate of return, rate base, and just and reasonable rates.

*Financial Condition of the Company*

The current financial condition of JCP&L is serious given the tremendous cash requirements imposed on it by the need to purchase substantial replacement energy to replace the capacity lost due to TMI-1, TMI-2, and

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Oyster Creek being out of service. In particular, it is expected that its existing lines of credit under the Revolving Credit Agreement (RCA) and with territorial banks may be reached or exceeded during the summer or early fall.

It is uncontested in this record that JCP&L currently has access to only three sources of funds:

- (1) Lines of credit under the RCA (\$139 million) and territorial banks (\$7.5 million) lines of credit.
- (2) JCP&L ratepayers.
- (3) Capital contributions from GPU.

With respect to (1), the combined limit is estimated at \$146.5 million. However, the representatives of the co-agent banks have indicated that the banks in the RCA may not allow JCP&L to draw down, existing lines of credit if a materially adverse regulatory change occurs either in Pennsylvania or New Jersey. With respect to (2), JCP&L ratepayers have had to assume \$199.9 million of increased rates since the accident with the prospect of further increases associated with the serious inflationary problems facing the entire nation. There is a need to balance the burden placed on these ratepayers, if at all feasible, consistent with the maintenance of JCP&L as an ongoing concern. With regard to (3), there is some prospect that the parent company GPU may be in a position to make a capital contribution to JCP&L from the proceeds of loans available under the RCA. However, it is obvious that this availability of funds is uncertain and contingent on the banks' reaction to regulatory action taken in New Jersey and Pennsylvania.

All parties have agreed that JCP&L cannot presently sell long-term debt or preferred stock and that GPU can-

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not sell common stock given the financial conditions of the respective companies.\* This is in stark contrast to the situation following the June 18, 1979 Order removing TMI-2 from rate base wherein JCP&L was shortly thereafter able to sell nearly \$100 million of First Mortgage Bonds to a variety of institutional investors as well as execute the RCA.

The Board clearly recognizes the serious financial condition of JCP&L. This Board will endeavor to work toward the preservation of JCP&L as an ongoing concern to avoid the potential devastating impact of insolvency or bankruptcy. Numerous witnesses before this Board and the Pennsylvania Public Utility Commission have persuasively argued that the consequence of involuntary insolvency or bankruptcy would be detrimental to the ratepayers, the economy of New Jersey, the other utilities in New Jersey, as well as the security holders of the affected companies. We clearly recognize our responsibility to attempt to preserve the economic and service viability of JCP&L. Alternatives to the current structure of JCP&L (if they exist) cannot be imposed upon ratepayers without careful deliberation and extensive analysis. Our ongoing commitment to the Strategic Options Study should be a clear message to all parties and the financial community that this Board will continue to exercise its regulatory responsibilities in a rational and deliberative fashion.

It is apparent from the review of the record before us that a significant number of financial indices related to JCP&L are at critically low performance levels. These

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\* Subsequent to the closing of the record on March 25, 1980, Moody's Investor Service downgraded the securities of JCP&L from a Baa rating to a Baa rating.

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indices indicate that JCP&L will for some time be unable to access traditional sources of capital. Absent access to these sources of capital, the company will be hard-pressed to maintain a construction program that is required to provide continued safe, adequate, and proper service pursuant to N.J.S.A. 48:2-23. In the past, the Board has recognized these conditions as a foundation for emergency interim rate relief pursuant to N.J.S.A. 48:2-21.1. In particular, in JCP&L Docket No. 743-184 the Board recognized the dire financial condition of this utility resulting in its inability to finance required construction through traditional capital markets and therefore provided emergent relief.

*Deferred Energy*

Since the accident, JCP&L has built up a substantial balance of deferred energy charges (approximately \$80 million). Obviously, these balances need to be addressed by this Board in future proceedings involving JCP&L. Reasonable replacement energy costs should be borne by the ratepayers if, in fact, this is the lowest cost method of providing safe, adequate, and proper service during this period of financial stress.

At the present time, the Company is facing a severe cash flow problem. The Board must address that problem directly. The Company is presently amortizing over 22 years some \$51.4 million of deferred energy costs incurred prior to the TMI accident. In order to mitigate the short run impact of removing TMI-1 from base rates, the Board has determined an immediate need to accelerate the recovery of these pre-TMI energy costs. This unprecedented action is in direct response to the critical cash

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flow problems faced by this company. When TMI-1 is returned to service, the Board will reevaluate the effects of the accelerated amortization based on the financial conditions at that time.

*Additional Regulatory Considerations*

It should also be noted that if and when TMI-1 is returned to service, the Board will expeditiously return the unit to rate base. The Board's primary concern is that the ratepayers of JCP&L continue to receive safe, adequate and proper service. The Board will attempt to minimize the cost of that service and, at the same time, continue its efforts to maintain JCP&L as an ongoing concern.

The Board has urged the NRC to allow the restart of TMI-1 as long as public health and safety aspects of the restart were resolved satisfactorily. The State of Pennsylvania has similarly argued that economic consequences of potential delay are contrary to the public interest. We again urge the NRC to recognize the economic and service consequences of further slippage in commencing the restart docket.

The Board is also concerned with the continued outage of the Oyster Creek Nuclear Unit. Each month's delay in returning this unit to service will cost JCP&L approximately \$14 million in additional replacement energy costs. As of February 29, 1980, JCP&L purchased over 75 percent of its total sources of energy. This heavy reliance on purchased power clearly indicates the company's need for additional base load capacity.

The Board is proceeding with Arthur Young & Company in the execution of the Strategic Options Analysis.

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Recent financial and operating problems compel us to accelerate the timetable for the Analysis in order to be prepared for critical decisions in the next several months. We are hopeful that a viable strategy will emerge which can be implemented to mitigate the forthcoming impacts of substantial rate increase requests. Resolution of JCP&L's problems will require an all-out effort to fully evaluate the relevant options and determine a reasonable State response to these critical problems. The welfare of over 690,000 customers bears heavily on these deliberations and will be a key factor in any option identification and implementation.

In addition, the Governor has commissioned this Agency to undertake certain important responsibilities with respect to the treatment of electric utility rate cases now pending. His detailed statement attached to the filing of Assembly Bill 3037 without approval, outlines a comprehensive approach to the question of the feasibility and rate impact of potential conversion of planned and proposed nuclear facilities to coal-fired facilities.

This mandate has an impact on the rate applications of Jersey Central Power and Light and will require additional data submissions.

The Board is charged with two responsibilities. The first, which has application here, is that in electric utility rate cases now pending and to be filed, the Board must evaluate the impact on rates of nuclear facilities now under construction as compared to alternative coal-fired facilities. The Governor specifically notes that these are quasi-judicial proceedings, affording all parties the right of introducing evidence and witnesses, cross-examination and the like.

*Appendix A*

It is, therefore, incumbent that this Petitioner in its forthcoming base rate application prepare a detailed submission on the rate impact of placing in service nuclear power facilities now under construction as compared to the impact of similar capacity coal-fired facilities. This would include a submission as to Forked River. TMI-II is out of service, however, the potential rate impact of possible conversion to coal of this facility should also be included for Board analysis. Petitioner and other parties will be further advised as to the procedures to be followed with respect to fulfilling the Governor's mandate as it relates to these rate matters and any to be filed.

Therefore, based on our evaluation of the record in this proceeding, the Board *FINDS*:

- 1) Given the extended period of unavailability and the impossibility of ascertaining when the unit may return to service, TMI-1 is not used and useful in supplying energy and should be removed from rate base. This results in a reduction of \$17.9 million in base rates.
- 2) The unamortized balance in petitioner's deferred energy account, accumulated prior to the TMI accident, is \$51.4 million as of March 31, 1980.
- 3) The company's financial needs are such that to insure its ability to continue to provide safe, adequate and proper service, the pre-TMI deferred energy account should be amortized over an accelerated period.

Therefore, based upon the foregoing, the Board *HEREBY ORDERS* that:

*Appendix A*

- 1) Three Mile Island Union No. 1 be removed from the rate base of petitioner effective April 1, 1980;
- 2) Petitioner file a schedule showing the accelerated amortization of the pre-TMI deferred energy account equivalent to \$17.9 million of additional annual revenue (adjusted to provide for revenue taxes) to be effective as of April 1, 1980.

DATED: April 1, 1980

(SEAL)

BOARD OF PUBLIC UTILITIES  
BY: (SIGNED)

GEORGE H. BARBOUR  
President

EDWARD H. HYNES  
Commissioner

ATTEST:

(SIGNED)

GERALD A. CALABRESE  
Secretary

**APPENDIX B**

**Decision and Order of the Board of Public Utilities  
(June 18, 1979)**

**[SEAL]**

**STATE OF NEW JERSEY  
DEPARTMENT OF ENERGY  
BOARD OF PUBLIC UTILITIES  
1100 Raymond Boulevard  
Newark, New Jersey 07102**

**6/18/79  
LEGAL/RATES**

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**IN THE MATTER OF THE PETITION OF JERSEY  
CENTRAL POWER AND LIGHT COMPANY FOR  
APPROVAL OF AN AMENDMENT OF ITS TARIFF  
FOR ELECTRIC SERVICE AND FOR AMEND-  
MENT TO THE ENERGY ADJUSTMENT CLAUSE  
AND FACTOR IN SAID TARIFF FOR SUCH SER-  
VICE.**

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**DECISION AND ORDER  
DOCKET NO. 795-427**

**Appearances Attached:**

*Appendix B***BY THE BOARD:**

On May 4, 1979, Jersey Central Power & Light Company, a public utility of the State of New Jersey, subject to the jurisdiction of the Board, pursuant to N.J.S.A. 48:2-13, submitted a revision of rates pursuant to N.J.S.A. 48:2-21 to become effective June 1, 1979.

This petition arises out of the events which occurred on March 28, 1979, at the Three Mile Island Nuclear Generating Station Unit No. 2 located in Middletown, Pennsylvania, of which the company is a 25% owner. The Company's proposed revised tariff, based upon the normalized test period of twelve months ending December 31, 1979, provides for no increase in base rates. The proposed rates provide for an amendment of its Levelized Energy Adjustment Clause (LEAC) presently at .755 mills per kwh and establishment of a new energy adjustment factor of 9.375 mills per kwh, which will increase its gross annual revenues by \$113 million.

Because of the emergent nature of this application, the Board scheduled expedited hearings commencing on May 21, 1979.

A number of parties intervened to contest the proposed increase in the Levelized Energy Adjustment Clause. These parties were Department of Public Advocate, Department of Energy, Ocean County Board of Chosen Freeholders, New Jersey Chapter of the National Association of Water Companies, Air Products and Chemicals Company, New Jersey Public Interest Research Group, United States Department of Defense and the Staff of the Board of Public Utilities. The petitioner presented direct and rebuttal testimony. Dr. Fred Grygiel, Chief Public Utility

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Economist and Anthony J. Zarillo, Executive Officer, testified on behalf of the Staff of the Board and the Department of Energy presented direct and rebuttal testimony. Additionally, at the Board's request, Aaron Levy, Esq. of the United States Securities and Exchange Commission testified solely on the question of reorganization and bankruptcy.

The Board conducted nine days of evidentiary hearings, and four separate evening hearings in the company's service area for the purpose of hearing public witnesses. Oral argument was held before the Board on June 14, 1979 at which time the active parties presented arguments regarding their positions.

After a full and complete review of the entire record in this matter, the Board has determined that the position of the Staff of the Board of Public Utilities is the proper one to be followed in this matter and we will, therefore, adopt it in this decision.

On May 23, 1979, the Board ruled (TR-384) that the issue of fault regarding the accident at Three Mile Island Unit 2 would not be one that would be considered in its determination of this phase of the case. We affirm that ruling for the very practical reason that numerous agencies, commissions and committees are actively pursuing this issue and it is unlikely that a relatively certain determination on this complex issue will be arrived at in the near future.

The issue of reorganization or bankruptcy has arisen in this case due to the financial strain caused by the TMI incident. Although we have considered the testimony of Mr. Levy of the Securities and Exchange Commission as well as the testimony of other witnesses, the Board at this time

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believes that the question of bankruptcy is not a viable alternative for this company. A trustee in bankruptcy would have the same monumental financial problems to confront as current management. The costs of replacement energy would still be present and the trustee would still have to come to this Board for relief. Reorganization or bankruptcy would benefit no one, either the company or the ratepayer, and would only serve to endanger the ability of JCP&L to provide adequate and proper service.

*Rate Base Treatment of TMI-1 and TMI-2*

Jersey Central Power and Light Company (JCP&L) has proposed to forego and return on one-half the equity investment in the Three Mile Island Two plant. The Company states that this proposal results in an equitable sharing between the ratepayers and shareholders of the financial impact caused by the unavailability of this plant (Exhibit JC-200). The Board's Staff and all other parties have joined in opposition to this position.

Staff argues that the Board should exclude from rate base TMI-2 and the related operating expenses, which will reduce the revenue impact of TMI-2 in the granting of any rate relief. The effect of this recommendation is to reduce the company's existing base rates by \$29 million. (TR-1162, Ex. JC-218). They contend that the record shows the plant will not be used and useful in providing electric generating service for a period of at least 2 to 4 years, if ever.

In proposing a recovery of purchase power costs, the Staff testified that if the company were allowed to recoup TMI-2 capital and operating costs through base

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rates, in addition to recovering the TMI replacement energy costs, there would be a double burden on utility customers. In the Staff's view this would represent an unfair sharing of these costs. All other active intervenors agreed with this staff position.

The Board adopts the Staff's position on this issue. Therefore, TMI-2 will be treated as a facility that is not used and useful in providing service to the utility's rate payers. This determination by itself results in a reduction of base rates by 29 million dollars.

Insofar as TMI Unit No. 1 is concerned, the Board finds that the outage of this facility is of a temporary duration. The record indicates that this unit may be placed back in commercial operation to provide service to its customers as early as August 1979. Furthermore, all calculations in determining replacement energy costs were based upon TMI-1 returning to commercial service as of January 1, 1980.

*LEAC FACTOR*

The major issue in this case is the replacement energy costs resulting from the TMI incident.

The level of replacement energy costs has been set out in JC-206(a), page 3 and JC-206, table D. These exhibits indicate that for the 21-month period from April 1, 1979 to December 31, 1980, replacement energy costs are estimated by the company to be \$138 million. The company, reduced them to give effect to savings from purchase power agreements with Allegheny Power Systems, Philadelphia Electric and Pennsylvania Power and Light Company of approximately \$16 million, resulting in a revised

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level of estimated replacement energy costs of \$122 million.

It is Staff's position that the company will realize additional savings of \$17 million of estimated replacement energy costs through the incentives that Staff proposed and purchased power agreements under negotiations. These savings could be accomplished through the ability of the Company to recover capacity charges through the LEAC; by extension of the existing agreements noted above; and by additional capacity purchases that are being negotiated with Ontario Hydro, Northern Indiana Power and Public Service of Indiana.

Further, the staff notes that company witnesses have testified that TMI-1 could return to commercial service as early as August, 1979. Staff used a service return date of January 1, 1980. Should TMI-1 return to service prior to this date, the company could realize additional savings of approximately \$5.5 million per month. While staff has not included this in its calculation, such an eventuality would put the company in an even better cash position. Therefore, the staff contends that the company's estimated replacement energy costs could be reduced to approximately \$105 million based on the Staff's assumptions. Staff, through Messrs. Grygiel and Zarillo concluded that the company's estimates did not give effect to the incentives and opportunities identified and recommended in their testimony.

Staff also contends that \$7.3 million should be used to further reduce the company's estimate of replacement energy costs. This amount represents an adjustment in recognition that the ratepayers, through the Staff's proposed LEAC, will be paying replacement energy costs from the date of the accident to July 1, 1979, the effective date of the proposed LEAC factor.

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The company has proposed a 14-month period of replacement energy costs to be recovered over 12 months. The Staff, on the other hand, used the company's estimate of replacement energy costs for the 21-month period (April, 1979 to December, 1980) to be recovered over 18 months.

Due to the magnitude of the incident and its extraordinary nature, the 18-month time frame must be considered reasonable. The Board is persuaded by Staff's argument on this issue. We view the contemplated reduction of \$17 million as a reasonable possibility. Therefore, we adopt Staff's recommendation that 98.3 million dollars of replacement energy costs be recovered by JCP&L over a period of 18 months. This is consistent with prior Board practices in allowing extraordinary expenses to be recovered over an extended period of time. While the Advocate and other intervenors have suggested a period of anywhere from 36 to 60 months, the Board considers the 18 month proposal most reasonable.

The Board also adopts the staff recommendations on the inclusion of the capacity charges related to the TMI incident in the calculations of the LEAC. This treatment is being permitted, in this limited instance, to provide an incentive to JCP&L to actively pursue all possible cost reducing purchased power agreements. Any capacity purchase successfully negotiated, that has associated with it a capacity charge should be treated as part of the net fuel cost savings and flowed through the LEAC.

With the allowance of the Staff's proposed LEAC factor of 6.275-mills per kwh and a removal of TMI-2 from base rates, the company will realize approximately \$45 million in additional annual revenues.

*Appendix B**Dividends*

The issue of suspending the Jersey Central Power and Light dividend is vexing. The company through its witnesses, has testified that to pass a dividend will be viewed by the financial community as a negative sign and could seriously jeopardize its ability to obtain lines of short-term credit through the proposed Revolving Credit Agreement and limit its access to long-term capital markets.

The staff has recommended to the Board that it order Jersey Central not to pay to General Public Utilities Corporation (GPU) some 35 million in dividend distributions during the balance of 1979. This action would, in the Staff's opinion, conserve Jersey Central's vital cash resources, and assist the petitioner in its efforts to secure longterm financing. (Exhibit BPU Staff 100).

Under ordinary circumstances, the general authority to regulate the rates and service of a public utility company does not comprehend the power to interfere in the internal affairs of the corporation, *N.J. Bell Tel. Co. v. Bd. of Pub. Utility Commrs.* 12 N.J. 568, 590 (1958); *Passaic Consolidated Water Co. v. Board of Public Utility Comm.*, 5 N.J. Misc. 1078, 1081-1082 (Sup. Ct. 1927) aff'd 104 N.J.L. 666 (E. & A. 1928); *State of Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289, 43 S. Ct. 544, 547, 67 L.ed 981, 985 (1923). The management of a utility is charged with responsibility of operating the assets of the corporation for the benefit of its shareholders; the regulatory commission supervises such operation to assure the promotion of the public interest. Because utility property remains private property, a regulatory commission is often precluded from exercising its authority in a way

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which would interfere with those important rights and incidents of private ownership vested in management. Nevertheless, where the policy of a utility company's management collides with the public interest, such rights and incidents of private ownership must yield to the paramount concerns of the State. Accordingly, even management's prerogative to declare and pay dividends to shareholders is not sacrosanct, when to do so would affect the utility's ability to render safe, adequate and proper service, see *Public Service Commission v. Jamaica Water Supply Company*, 42 N.Y. 2d 880, 397 N.Y.S. 2d 784, 366 N.E. 2d 872, Ct. App. 1977 aff'd o.b. 54 A.D. 2d 10, 386 N.Y.S. 2d 230 (3rd Dept. 1976); See also *State ex rel Kansas City Transit, Inc. v. Public Service Commission*, 405 S.W. 2d 5, 11-12 (Mo. Sup. Ct. 1966) (en banc). In his decision for the intermediate appellate tribunal in *Jamaica Water Supply*, Justice Herlihy commented:

"In our opinion, the general mandate of the Public Service Law to assure safe and adequate service at just and reasonable rates (Public Service Law, §89-b, subd. 1; §89-c, subd. 4; §89.J) necessarily implies the power to control the disbursements of funds as dividends. The fact that dividends are solely a matter of corporate affairs does not insulate them from having an impact on rates and service. The solvency of a public utility is clearly related to its status as an organization capable of providing the public service for which it was franchised." (386 N.Y.S. 2d at 232).

Utility solvency and its ability to provide service, the critical issues in *Jamaica Water Supply*, are addressed in this proceeding. The recent experience of this Board,

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in the emergent treatment of Jersey Central's application for approval of the "yellowcake" financing (Docket No. 795-487), is illustrative of not only the company's extreme cash-flow difficulties, but the potential for service disruption. A substantial portion of the proceeds of that \$30 million secured loan was used to pay the April bill for service rendered by the PJM pool to Jersey Central. If Board approval of the agreement had not been forthcoming and if the PJM pool had insisted upon payment, the petitioner would have faced potentially grave financial consequences (i.e., event of default). Therefore, the importance of maintaining adequate cash resources rather than expending the money to pay dividends, cannot be understated.

The Board adopts staff's position on the issue of dividends and directs at this time that JCP&L not pay to GPU any dividend for the remainder of 1979. By the Order the Board is not precluding GPU from issuing dividends to its common stockholders. We are merely stating that the present evidence as to the financial condition of Jersey Central Power and Light Company is in our view such that for it to issue dividends to its parent GPU, might so exacerbate its cash position as to jeopardize its ability to keep its property in a condition to provide safe, adequate and proper service, N.J.S.A. 48:2-29.2.

*Other Issues*

The Board has had discussions with the Governor's Office and expressed its concern over the applications of the gross receipts and franchise taxes applicable to the replacement energy during this emergency. We feel that to collect these taxes at this time, due to the extraordinary

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nature of this incident places an unfair burden on the ratepayer. We have recommended that the State forego the collection of gross receipts and franchise tax revenues which can be attributable to the cost of the replacement energy.

To further aid the petitioner in its efforts to provide the lowest cost energy to ratepayers during this period, the Board has discussed the problem with our gas utilities. These discussions may lead to certain economy sales to JCP&L, with the economic benefits to flow to ratepayers.

The Board has also had discussions with the Federal Energy Regulatory Commission and the PJM interchange on the possibility of supplying JCP&L with replacement energy at cost, rather than through the current split savings pricing mechanism. We direct JCP&L to continue these discussions and would hope that Atlantic City Electric and PSE&G join in their effort.

Further, the Board has discussed with the New Jersey Congressional delegation and Federal officials the possibility of the Federal Government lending assistance during this time of dire financial crisis.

Based upon the foregoing, the Board *HEREBY FINDS* that:

1. JCP&L Company is a public utility of the State of New Jersey subject to the jurisdiction of the Board.
2. TMI-I nuclear generating station is experiencing a temporary outage and is expected to return to commercial service on or about January 1, 1980.

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3. TMI-2 nuclear generating station is out of commercial service is not used or useful due to substantial physical damage, and will not return to service, for two to four years, if ever.
4. On the basis of two and three above, TMI-1 should continue to be reflected in base rates until January 1, 1980; and TMI-2 should be removed from base rates until that unit is returned to commercial service.
5. The revised LEAC proposed by the Company designed to recover \$113 million of additional revenues for replacement energy costs relating to the TMI nuclear accident be denied.
6. The petitioner's estimate of replacement energy cost over the 21 month period (April 1979 to December 1980) of \$138 million is reasonable.
7. The petitioner's estimated savings of approximately \$16 million associated with anticipated purchase power agreements are reasonable.
8. The staff's additional estimated savings of \$17 million associated with petitioner's purchase power agreements now being negotiated, as well as to reflect the staff's incentive of passing capacity charges through, the LEAC, are reasonable.
9. The staff's proposed \$7.3 million adjustment in recognition of the allowance of replacement energy cost for April, May and June, is reasonable.

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10. Based on the above findings in 6, 7 and 8, the Board finds that JCP&L should be given an opportunity to recover approximately \$98 million in replacement energy costs through the 18 month LEAC factor.
11. Petitioner's apparent financial position is such that the payment of dividends to GPU might impair JCP&L's ability to provide safe, adequate and proper service.

Therefore the Board *HEREBY ORDERS THAT*:

1. Petitioner file for the Board's consideration revised tariff to produce an annual reduction of \$29 million in base rates.
2. Petitioner file a revised LEAC tariff to reflect a new LEAC factor of 6.275 mills/kwh.
3. The treatment of capacity charges associated with purchased power agreements related to replacement energy costs associated with the TMI incident be recognized directly through the LEAC factor.
4. Petitioner file monthly statements reflecting the status of TMI-1 and TMI-2 together with any reports filed with or from the Nuclear Regulatory Commission or any other governmental agency or institution involved in the investigation of this incident.

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5. Petitioner file monthly reports covering the cost of rehabilitating TMI-2 as well as the scheduling of these rehabilitation activities.
6. Petitioner file monthly reports on the results of the LEAC factor herein authorized, indicating the actual vs. budgeted energy replacement cost and the revenues derived therefrom.
7. Petitioner file with the Board reports of the status of all purchased power agreements.
8. Petitioner file monthly reports indicating the level of short-term borrowing outstanding under the RCA, and the company's legal limit of short-term borrowings.
9. Based on present cash projections, petitioner is not to pay any dividend to its parent, GPU, during the remainder of 1979.
10. JCP&L eliminate the appropriate gross receipts and franchise taxes from all sales made to other New Jersey public utilities.
11. The parties to this proceeding shall within the next several weeks identify the remaining issues in controversy and develop a schedule of hearings to deal with those issues. In particular, the parties should address the need for a management audit of JCP&L, and determine a conservation strategy consistent with this crisis situation.

*Appendix B*

DATED: June 18, 1979

(SEAL)

BOARD OF PUBLIC UTILITIES  
BY: (SIGNED)

GEORGE H. BARBOUR  
President

RICHARD B. MCGLYNN  
Commissioner

EDWARD H. HYNES  
Commissioner

ATTEST:

(SIGNED)

GERALD A. CALABRESE  
Secretary

*Appendix B***JERSEY CENTRAL POWER AND LIGHT COMPANY****Docket No. 795-427**

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*Appendix B*

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